TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 255.

THE CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED FEBRUARY 20, 1901.

(18,056.)

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1 UNITED STATES OF AMERICA, }
District of Kentucky, } ss:

At a stated term of the circuit court of the United States of America within and for the district of Kentucky, in the sixth judicial circuit of the United States of America, begun and held at Federal Court hall, in the city of Covington, Kentucky, in said district, on the first Monday of December, being also the 3rd day of that month, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-fifth year.

Present: Hon. Walter Evans, sitting as circuit judge.

THE FIRST NATIONAL BANK OF COVINGTON, KY., a Corporation, }
vs. }
THE CITY OF COVINGTON, a Municipal Corporation, and JOHN N. Middendorf, the Assessor of the City of Covington. }

Be it remembered that heretofore, to wit, on the 23rd day of July, A. D. 1900, came the complainant, by its attorney, and filed in the clerk's office of said court its bill of complaint against the defendants herein. Said bill of complaint was and is in words and figures following, to wit:

2 United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, a Corporation, }
vs. } Bill of Complaint.
THE CITY OF COVINGTON, a Municipal Corporation, and John N. Middendorf, the Assessor of the City of Covington. }

To the honorable the judge of the circuit court of the United States in and for the district of Kentucky:

The First National Bank of Covington, Kentucky, a corporation organized, existing, and doing business in the city of Covington, Kentucky, under and by virtue of the act of the Congress of the United States known as the national bank act and amendments thereto, brings this its bill against the City of Covington, a municipal corporation organized and existing under the laws of the State of Kentucky, and John N. Middendorf, the duly elected, qualified, and acting city assessor of the city of Covington and a citizen of said State of Kentucky and an inhabitant of the district of said State of Kentucky.

And thereupon your orator complains and says that it was organized, authorized, permitted, and chartered to do business as such national bank in the city of Covington, Kentucky, on the 17th day of November, 1884, for a term of twenty (20) years thereafter, up to and including the 17th day of November, 1904, the authority so to

do having been issued to it upon said 17th day of November, 1884,
by the then Comptroller of the Currency of the United States;
3 and the said City of Covington is a city of the second class in
and of the State of Kentucky, and was a municipal corporation in Kentucky at all the times herein stated; and the said John N. Middendorf is now and has for more than one year last past been the city assessor of said city of Covington.

And your orator, further complaining, says that the Commonwealth of Kentucky, by an act of its General Assembly, incorporated in 1834 the Bank of Kentucky, which by this act of incorporation and amendments thereto was authorized to engage in the business of banking for a term ending in the year 1906, and by other acts of its General Assembly it incorporated the Northern Bank of Kentucky and the Farmers' Bank of Kentucky and other banking institutions, and by said acts of incorporation and amendments thereto authorized and empowered the said banks to engage in and do a general banking business in the State of Kentucky until the said year 1906, and it says that it was provided in the various acts incorporating said respective banks that said banks should, through their cashiers, on the first day of July in each year during the continuance of their charters, pay into the treasury of the State fifty cents on each share of $100 of stock, which should be in full of all tax or bonus, and your orator says that from the year 1835 up to and including the year 1886, in pursuance of the contracts thus made by the State of Kentucky to and with said banks, all banks doing business in the State of Kentucky paid into the treasury of the State of Kentucky in July of each and every year a tax of fifty cents on
each one of its shares of one hundred dollars, although at no
4 time during said period was so great a rate of tax paid to
the said Commonwealth upon any other species or kind of property.

Complainant says that beginning with the year 1882 an effort was made to subject the property of the said Bank of Kentucky and the Farmers' bank and other banks to the payment of local or municipal taxes in addition to the said tax paid to the State of Kentucky, and subsequently an effort was made to subject national banks located within the said State to the payment also of local or municipal taxes, in addition to the fifty cents on each share of one hundred dollars of its capital stock, and that was paid to the said Commonwealth.

And complainant says that on and before the 17th day of May, 1886, suits were pending in the courts of the Commonwealth of Kentucky under the styles of The Bank of Kentucky against The City of Frankfort, and the Farmers' Bank of Kentucky against The City of Frankfort, and The City National Bank of Paducah, Kentucky, against The City of Paducah, etc., wherein *it* was asserted by the respective municipalities the right to subject the property of the said banks to the payment of municipal taxes, and such right being controverted by the said respective banks.

And complainant says that the said Commonwealth of Kentucky, by an act of its General Assembly approved the 17th of May, 1886,

entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," and by article second thereof, under the subject of "Stocks in banks and other institutions," in view of the fact that under the contract it had entered into with said bank, whereby, upon a payment by the banks in said State of Kentucky to its annually of fifty cents on each share of one hundred dollars of their respective stock, they were exempt from the payment of any other tax or bonus during and for the period ending in 1906, and in view of the said controversies then pending for judicial determination, proposed to the banks and other institutions of loan or discount within the State of Kentucky, and provided as follows, to wit:

SECTION ONE. "That shares of stock in State and national banks, and other institutions of loan and discounts, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions, and corporations shall in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

And further provided that the auditor of public accounts might, at his option, investigate the books of such banks or institutions for the purpose of ascertaining the surplus, &c., and made said banks and institutions subject to indictment and fine for refusal to allow such investigation to be made.

And by section two: "The cashier of a bank, and the treasurer of any other institution or corporation whose stock is taxed, shall on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due."

And further imposed a penalty upon the cashier for failure to pay such tax, and required an affidavit from him stating the amount of the capital stock, &c., of the bank and how the surplus was invested.

SECTION FOUR. "That each of said banks institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided, and to waive and to release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement

or consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of said bank."

SECTION FIVE. "That said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the next General Assembly:—Provided, they pay the tax provided in section 1 from the passage of this act."

SECTION SEVEN. "If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its surplus, undivided accumulations, and undivided profits, shall
7 be assessed as directed by section 2 of this act, and the same taxes, State county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals. Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or buildings owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

And your orator, further complaining, says that the terms and conditions of said act of May 17th, 1886, were accepted by and the contract therein provided for entered into and made with the State of Kentucky by said Bank of Kentucky, Farmers' bank, and Northern Bank of Kentucky, and by a very large majority of all the banks, both State and national, and other institutions of loan and discount in the State of Kentucky.

Complainant says that within the time provided by section 5 of said act and upon the 22nd June, 1887, at a called meeting of its stockholders, a majority in interest and of a quorum of its stockholders gave their consent to the levying of the tax thus provided and agreed to pay same as in said act provided, and to waive and release all rights of the plaintiff under the acts of Congress or under the charter of the State banks to a different mode or smalled rate of taxation, and authorized the proper officers of the complainant to so agree, consent, and waive and to make and enter into said contract, upon the part of this complainant and its shareholders, to and with the State of Kentucky, and to deliver to the governor of said
8 State a writing, under seal of complainant and executed by its proper corporate authorities, evidencing such agreement, consent, and contract to and with the State of Kentcky.

And complainant says that upon the 22nd June, 1887, it did deliver to the then governor of the Commonwealth of Kentucky such written agreement and consent, an authenticated copy of which is filed herewith as part hereof, marked "Exhibit A," wherein and whereby the State of Kentucky entered into an irrevocable contract with your complainant, which the said State cannot annul or repeal without the consent of your complainant, and is binding on said

State and all its departments, including the defendant City of Covington.

And your orator, further complaining, says that it, the complainant, has paid said tax, as provided in section one of said act, from the passage of said act of the 17th of May, 1886.

And complainant says that upon the first day of July of each and every year since the passage of said act of May 17th, 1886, and the making of said contract and agreement with the State of Kentucky it has made to the auditor of public accounts of said State the reports as by section 2 of said act required and paid into the treasury of the State of Kentucky a tax of seventy-five cents on each of its shares of stock of one hundred dollars and on the surplus and on the excess of surplus and on its real estate, as by said law provided and by the said contract agreed, which tax by it so paid has been accepted and received and retained by the State of Kentucky. It says that it has since regularly and each year paid to defendant City of Covington all the tax assessed or demanded by said city on its real
9 estate and banking building, and there is now no tax claimed by said defendant to be due or owing thereon.

Your orator, further complaining, says that the rate of taxes assessed by the State of Kentucky upon all other real and personal estate during all of said years, beginning with the year 1886, and since that time, has not exceeded in any one year fifty-two and one-half cents on each one hundred dollars of assessed valuation, and during several of said years has been much less, being as low as forty-two and one-half cents on each one hundred dollars' valuation during a part of said period.

Complainant avers that the defendant City of Covington and all of its officers, including the defendant John N. Middendorf, are exclusively estopped by former litigation and adjudication between your complainant and said City of Covington to contend in this suit that your complainant has not an irrevocable contract with the State of Kentucky limiting its taxes to those fixed in said act of 17th May, 1886, known as the Hewitt law, and that the said city has not right to assess for taxation for municipal purposes or collect any taxes on any of its shares of stock or any of its property other than its banking building and the land upon which it is situated.

Complainant says that the State of Kentucky, by an act of 11th of November, 1892, of its General Assembly, which became a law without the signature of the then governor, undertook to provide a different mode of assessing the value of the capital stock and property of complainant and other banks in the State of Kentucky, and to invalidate and repeal the contract entered into by and
10 between it and the State of Kentucky, as hereinbefore stated, under the act of May 17th, 1886, commonly known as the Hewitt law, to which invalidation and repeal this complainant never consented or agreed, said act of 11th of November, 1892, constituting the auditor, treasurer, and secretary of state a board of valuation and assessment for fixing the value of the franchise of all banks and providing that all banks should annually pay a tax on such valuation so fixed to the State of Kentucky and a local tax thereon to the county,

incorporated city, town, or taxing district where the bank was situated, and said board of valuation and assessment did fix the value of the franchise of this complainant, upon which it would pay tax to the defendant The City of Covington for the year 1893, at $719,441.30, and certified the same to the county court clerk of Kenton county, Kentucky, in which county your complainant was and is situated, which clerk certified the same to the city treasurer of defendant City of Covington, all of which was in accordance with said act of 11th of November, 1892, and the defendant's rate of taxation for said year 1893, being two dollars and seven cents on the one hundred dollars valuation, made a tax of $14,892.43, which said city claimed to be entitled to receive for city purposes from this complainant and for which it threatened to distrain and to take other steps by said act authorized, said defendant, City of Covington, claiming that said contract had been invalidated and repealed, and your complainant having theretofore paid to said defendant, City of Covington, the taxes upon its real estate and banking building that were used in carrying on its business, the said $14,892.30 or any part thereof not being claimed upon the real estate owned by complainant. Complainant, insisting and
11 relying upon its contract made and entered into with the State of Kentucky, as heretofore stated, which exempted it and its shares of stock from all taxation by the City of Covington, and that the said defendant had no right to assess or exact any taxes whatsoever upon its capital stock or the shares thereof, and that it and its shares of stock were exempted from taxation by the said defendant, and the said defendant, City of Covington, contending that said contract had been by the State of Kentucky invalidated and repealed, and that this complainant and its shares of stock were not by reason of such contract exempt from taxation by the City of Covington, it, the complainant, on the 17th of November, 1893, filed its action in equity in the Kenton circuit court against the defendant herein, The City of Covington, the said Kenton circuit court being a court of full and complete jurisdiction in the premises, setting up the making and existence of its said contract with the State of Kentucky and the facts in relation thereto and all the facts hereinbefore stated, and that the State of Kentucky had no right to annul or repeal said contract, and that said act of 11th of November, 1892, in so far as it attempted so to do, was in violation of the Constitution both of the United States and of the State of Kentucky in impairing the obligation of a contract, being in violation of section 10, article 1, of the Constitution of the United States and of section 19 of the constitution of the State of Kentucky, and relying on its contract, as hereinbefore stated and entered into, and that by reason of said contract it and its shares of stock were exempt from any taxation by the defendant City of Covington during the corporate existence of complainant, and by the prayer thereof
12 prayed that the City of Covington be enjoined and restrained from collecting or attempting to collect said alleged tax of fourteen thousand eight hundred ninety-two and $\frac{43}{100}$ ($14,892.43) dollars or any part thereof, and that said alleged claim be adjudged

invalid by reason of said contract, and for all proper relief and for its costs, etc. Complainant says that summons was issued upon its said petition in equity so filed, and was executed upon the defendant The City of Covington on the 17th of November, 1893, and upon the 27th of November, 1893, said defendant, City of Covington, appeared to said petition in said action and filed its demurrer to said petition; and it says that thereafter the judge of the Kenton circuit court, being personally interested in the result of the litigation, declined to preside in said cause of this complainant against The City of Covington, and by agreement said cause was transferred to the Campbell circuit court at Newport, Kentucky, it being a court of full and complete jurisdiction in the premises, and the said cause thereafter proceeded in the said court to a final hearing and determination. It says that said cause having been presented to the said Campbell circuit court, it having been fully advised in the premises, on the 27th of January, 1894, adjudged and decided that the said demurrer of complainant to the said petition in equity should be overruled, and, the defendant failing and refusing to answer in the case, the said Campbell circuit court adjudged and determined that the contract entered into by and between the said plaintiff, the complainant herein, and the State of Kentucky on the 17th May, 1886, known as the Hewitt law, was valid and binding and was irrevocable during the
13 existence of this complainant by paying said tax to the State of Kentucky of seventy-five cents on each of its shares of capital stock equal to one hundred dollars, and on the excess of its surplus, as in said Hewitt law provided, which should be in full of all taxes, State, county, and municipal, and that the City of Covington could not demand or collect any taxes whatsoever upon any of its shares of stock or any of its property except the real estate owned and used by it for conducting its business, and perpetually enjoined the said City of Covington from attempting to collect said alleged tax for said year 1893 by said city claimed; and complainant says that the said City of Covington excepted to said judgment of the Campbell circuit court and prayed an appeal to the court of appeals of Kentucky therefrom, which appeal was by said Campbell circuit court granted. Complainant says that the defendant City of Covington prosecuted said appeal from said judgment of the Campbell circuit court to the court of appeals of Kentucky, and the said matter was presented and submitted to the court of appeals of Kentucky, and the said court thereafter, upon the first day of June, 1895, adjudged and determined that the written acceptance by complainant of the provisions of the said revenue law of 1886, known as the Hewitt law, constituted an irrevocable contract between it and the State of Kentucky during its corporate existence, and that it and its shares of stock were exempted from any taxes by the defendant City of Covington during the corporate existence of complainant, and that the provisions of said act of 11th of November, 1892, attempting to authorize such taxation, *was* in violation of the provisions of the Constitution
14 of the United States, that no State could pass any law impairing the obligations of a contract, and also violative of the

State constitution, and affirmed the judgment of the Campbell circuit court, from which the said City of Covington had appealed. The opinion and judgment of said court of appeals of Kentucky in said cause of City of Covington, appellant, against The First National Bank of Covington, Ky., appellee, is reported at pages 590 to 646, both inclusive, of volume 97 of the reports of the cases decided by said court of appeals of Kentucky.

Complainant says that thereupon, upon the 10th day of October, 1895, the said court of appeals issued its mandate on said judgment; which mandate is in words as follows, to wit:

"THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CITY OF COVINGTON, Appellant,
vs.
FIRST NATIONAL BANK OF COVINGTON, Appellee.

Appeal from a judgment of the Campbell circuit court.

JUNE 1, 1895.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

A. A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*"

Complainant says that said mandate was, upon the 2nd day of December, 1895, filed in the said cause in the Campbell circuit court.

15 Complainant files herewith as part of this its bill a certified copy of the entire record in said cause in the Campbell circuit court, all pleadings, orders, and judgments, and marks it Exhibit "B."

Complainant further says that the said judgment of the court of appeals of Kentucky in said appeal by the said City of Covington, defendant herein, from the said judgment of the Campbell circuit court in favor of this complainant in said cause so adjudging that this complainant had such irrevocable contract with the State of Kentucky, and that the said defendant, City of Covington, by reason of said contract, had no right to assess for taxation its capital stock or its shares of stock or any property of this complainant other than its real estate and banking building, as hereinbefore stated, or to collect or to attempt to collect any taxes from it or upon its said property or capital stock or shares of stock or any part thereof, and that it- shares of stock are not assessable by the said defendant, City of Covington, for taxation during the corporate existence of complainant, has never been reversed or modified in any respect, nor was there ever any appeal therefrom, and said judgment and holding by said Campbell circuit court and by the court of appeals of

Kentucky was and is final and conclusive between this complainant and the City of Covington, and the question as to the existence of said irrevocable contract by and between it and the State of Kentucky, precluding the defendant, City of Covington, from in any way asserting such claim for taxes against it or against its shares of stock or any of its property other than its real estate and banking
16 building, as hereinbefore stated, during its said corporate existence, was and is *res judicata* and binding and conclusive upon said defendant, City of Covington, and all of its officers and agents and this complainant during the term of its corporate existence, as hereinbefore stated, and said City of Covington is conclusively estopped from claiming or asserting to the contrary or assessing for or attempting to collect any tax on its shares of stock or other property other than its real estate.

And complainant further shows unto your honor that the defendant City of Covington, notwithstanding the premises, is asserting the right and power to assess for taxation for municipal purposes all of the shares of the capital stock of this complainant for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, and 1900, and said City of Covington and its city assessor, John N. Middendorf, are claiming the right and power so to do by reason of the provisions of the act of the General Assembly of the Commonwealth of Kentucky, entitled "An act relating to the taxation of shares of stock of national banks," approved March 21, 1900, being senate bill No. 188, and chapter 23 of the Session Acts of 1900 of the General Assembly of the Commonwealth of Kentucky, and found on page 65 of the official publication of the acts of said session of said General Assembly, said act and its preamble being as follows:

"Whereas the Supreme Court of the United States has lately decided that article three, chapter one hundred and three of the Acts Eighteen hundred and ninety-one, Eighteen hundred and ninety-two, Eighteen hundred and ninety-three is void and of no
17 effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

SEC. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

SEC 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of eighteen hundred and ninety-two, said bank shall be
18 excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

SECTION 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three of the revenue law and said decision of the Supreme Court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

And your orator, further complaining, says that the said
19 defendant, John N. Middendorf, city assessor of the city of Covington, heretofore on the — day of May, 1900, called upon this complainant and demanded of it that it report to and list with him for taxation for municipal purposes by the City of Covington all of the shares of stock of this complainant for the years 1893 to 1900, both inclusive, and that in response to said demand its board of directors, on the 6th day of June, 1900, adopted a resolution directing its president and cashier, for the reasons in said resolution set out, being the same as in this bill set forth, not to report to or list with the said city assessor of the city of Covington for taxation any of the shares of its stock, and it furnished a copy of said resolution to the said John N. Middendorf, city assessor of the city of Covington. A copy of said resolution so adopted by its board of directors and presented to said city assessor of the city of Covington is filed herewith as part hereof, marked "Exhibit C."

Your orator further says that heretofore, on the — day of June, 1900, the said John N. Middendorf, city assessor of the city of Covington, caused to be executed upon Frank P. Helm, the president of

complainant, a notice in writing, calling upon said Frank P. Helm, as president of this complainant, to, on or before the 30th day of June, 1900, report to him, said John N. Middendorf, city assessor as aforesaid, at his office and list with him for taxation for municipal purposes by the City of Covington all of the shares of stock of this complainant for the said years 1893 to 1900, both inclusive; and the said John N. Middendorf, city assessor, as aforesaid, has announced to said Frank P. Helm, president, and threatened that unless the said Frank P. Helm, as president of complainant, will forthwith report to and list with him, as such city
20 assessor, for taxation for municipal purposes by the defendant City of Covington all of the shares of stock of this complainant, that he, the city assessor, as aforesaid, will state the facts to the police judge of the defendant City of Covington and cause said police judge to issue a warrant against said Frank P. Helm, the president of this complainant, or its cashier, and move said judge of the police court of the city of Covington to fine said Frank P. Helm, president, as aforesaid, or said cashier, for failing to report to and list with him, as city assessor, as aforesaid, all of the shares of stock of this complainant for taxation for municipal purposes by the City of Covington, and by process of contempt from said court compel said Frank P. Helm, president, as aforesaid, or its cashier, to list said shares of stock for taxation for municipal purposes by the City of Covington for each of the years aforesaid, said John N. Middendorf claiming the right and power so to do under and by reason of the provisions of the general law of Kentucky governing cities of the second class in said State, of which class the defendant City of Covington is, and especially and particularly section 3179 of the Kentucky statutes.

Your orator further shows unto your honor that during each of said years 1893, 1894, 1895, 1896, and up to first day of July, 1897, the capital stock of complainant was $500,000, and since then and is now $300,000, divided into shares of one hundred dollars each, which shares during all of said time and now are of a fair cash value of at least one hundred dollars each, and there was levied by the city council of the defendant City of Covington upon each one hundred dollars' valuation of taxable property within the
21 corporate limits of the said city of Covington a tax of two dollars and seven cents for the year 1893 and two dollars for each of the years 1894 to 1898, both inclusive, and a tax of one dollar and seventy-five cents for the year 1899 and one dollar and ninety cents for the year 1900; and there is more than two thousand dollars involved in this litigation, and the tax upon its shares of stock asserted by said defendant, City of Covington, would amount to more than two thousand dollars for each and every of said years.

And your orator says that, unless enjoined and restrained by this honorable court, the said City of Covington and said John N. Middendorf, city assessor of the city of Covington, will undertake to have the president or cashier of this complainant arrested by warrant from the police court of the city of Covington, and the said president or cashier will be required to employ counsel and make

defense, or this complainant on their behalf, and in case of proceeding by contempt complainant will be deprived of the services of its said president or cashier, and in any case their time will be taken in defending such proceeding, and it will be deprived of their attention, essential to its business, and the said City of Covington and its city assessor, John N. Middendorf, will undertake to assess for taxation for municipal purposes by the city of Covington all of the shares of stock of this complainant for each of said years and collect the tax so assessed and levied; and complainant says that the attempted assessment of its shares of stock and collection of taxes thereon by the City of Covington for municipal purposes and said proposed arrest of the president or cashier of this complainant is without authority of law, and said act of the
22 said General Assembly of the Commonwealth of Kentucky of 21st of March, 1900, is in violation of and an impairment of the obligations of the contract entered into by and between it, this complainant, and the State of Kentucky upon the 22nd of June, 1887, and, as to complainant, unconstitutional and void; and complainant says that said action by the City of Covington and by its city assessor and the attempted assessment or collection of any tax whatsoever from it or upon its shares of stock, as hereinbefore stated, and said act of the General Assembly of the Commonwealth of Kentuckey, approved 21st March, 1900, hereinbefore referred to, in so far as it attempts to in any way authorize or empower said City of Covington to impose or collect such tax, was and is null and void and contrary to the provisions of the Constitution of the United States, and contrary to section 10, article I, of said Constitution of the United States, and is an attempted taking of the property of complainant and of its shareholders for public use and without due process of law, and is a taking of their property without just compensation, and in violation of and contrary to the provisions of article V of the amendments to the Constitution of the United States.

And your orator, further complaining, says that such assessment by defendant City of Covington and its assessor, John N. Middendorf, or other officer, will be illegal, in violation of complainant's contract, as has been heretofore in said cause between it and said City of Covington adjudged, and will be unlawful and violative of complainant's contract; will cast a cloud over complainant's shares of stock and of its legal rights, and cause much litigation, and with no tribunal provided by law to which it can appeal for redress save the
23 courts, and damage it and its shareholders in a way that cannot be repaired or estimated at the common law, but its only remedy is by a bill in equity, and unless restrained by this honorable court the defendants City of Covington and John N. Middendorf, city assessor, will attempt to assess, levy, and collect taxes under said act of 21st March, 1900, and will subject complainant to the embarrassment of much litigation and cast a cloud on its shares of stock, its franchise and property, and the effort will be made to arrest its president or cashier and proceed by contempt in said police court, and to collect a penalty imposed by the charter of the defendant on all delinquent tax bills.

And your orator, further complaining, says that all this is contrary to equity and tends to the manifest wrong and injury of complainant in the premises. In consideration thereof and forasmuch as complainant is remediless in the premises at and by the rules of law, and can have adequate relief only in a court of equity, where matters of this kind are properly cognizable and relievable—

To the end, therefor-, that your orator may have the proceedings on the part of the City of Covington and its city assessor to assess for taxation and collect any tax for municipal purposes by said City of Covington all or any of the shares of its stock or its property, other than its real estate and banking building, for the years 1893 to 1900, both inclusive, and the proceedings to arrest the president or cashier of this complainant, and thereby to compel said officer to list the said shares of stock for said purposes for said years, may be enjoined, and that it may be adjudged
24 that there is an irrevocable contract by and between this complainant and the State of Kentucky upon the continued compliance by it with the provisions of the said act of the General Assembly of the Commonwealth of Kentucky of 17th May, 1886, whereby no taxes for municipal purposes can be exacted from it or imposed upon the shares of stock or any of its property whatsoever of any kind or character, save and except its real estate and banking building, where it does business, during or pending the corporate existence of complainant, to wit, until and including the 17th November, 1904, and that said act of said General Assembly, approved March 21st, 1900, in so far as it attempts to impair the validity of said contract, be declared null and void and contrary to the provisions of the Constitution of the United States, your orator respectfully prays that a temporary injunction may be granted as follows: restraining said defendant City of Covington, and its said city assessor, John N. Middendorf, from assessing or attempting to assess for taxation for municipal purposes by the City of Covington for the years 1893 to 1900, both inclusive, or any of them, the said shares of stock or any of it or its capital stock or its property of any kind or character, and from arresting or attempting to arrest said Frank P. Helm, its president, or its cashier for failure and refusal to report to and list with the said city assessor said shares of stock for taxation for said purposes for said years, and that upon final hearing said injunction may be made perpetual, and that the contract aforesaid by and between it and the State of Kentucky be adjudged to be irrevocable during the corporate existence of complainant, and that said act of the General Assembly of the
25 Commonwealth of Kentucky, approved March 21st, 1900, be declared null and void in so far as it attempts to impair the validity of the contract aforesaid, and that such irrevocable contract exists between it and the State of Kentucky is *res judicata*, and that defendant City of Covington is estopped to claim or assert that plaintiff has not such irrevocable contract.

And may it please your honor to grant unto your orator writ of subpœna, issuing out of and under the seal of this honorable court, directed to said defendants respectively, therein and thereby com-

manding them and each of them, upon a day certain and under a penalty to be therein inserted, to personally be and appear before this honorable court and then and there to answer the premises (but not under oath), and to stand to and abide by such orders and decree therein as to the court shall seem proper.

And may it please your honor to grant unto your orator such other and further relief in the premises as shall be agreeable to equity and good conscience.

J. W. BRYAN,
Solicitor for Complainant.

UNITED STATES OF AMERICA, }
State of Kentucky, County of Kenton. }

Frank O. Helm, being first duly sworn, on oath says that he is the president of The First National Bank of Covington, Kentucky, the complainant in the above-entitled cause; that he has read the foregoing bill of complaint and knows the contents thereof to be true except as to such matters as are therein stated from information and belief, and that as to those things he believes them to be true.

FRANK P. HELM.

26 Sworn to before me and subscribed in my presence this 19th day of July, A. D. 1900.

R. K. TARVIN,
Notary Public, Kenton Co., Ky.

My commission expires Jan'y 8, 1902.

Exhibit "A" referred to in the foregoing bill of complaint was and is in words and figures following, to wit:

EXHIBIT "A."

A. Shinkle, president. I. D. Fry, cashier.

First National Bank of Covington, Ky.

Capital, $500,000; United States depository; surplus, $160,000.

COVINGTON, KY., *December* 24, 1887.

To his excellency, S. B. Buckner, governor of the State of Kentucky.

SIR: We hereby certify that at a called meeting of the stockholders of the First National Bank of Covington, Ky., held at their banking-house, on Wednesday, June 22, 1887 (notice of time and object of said meeting having been sent to each stockholder), there were represented 3,603 of the total 5,000 shares of the capital stock of the said bank, and by a unanimous vote of the shares then represented, agreed and consented to accept the provisions of the act of the legis-

lature of Kentucky, chapter No. 1233, article No. 2, passed at the session of 1886.

Approved May 17, 1886.

A. SHINKLE, *President.*
I. D. FRY, *Cashier.*

A copy.
Attest: GEO. G. COULTER, *Auditor.*

27 Exhibit "B" referred to in the foregoing bill of complaint was and is in words and figures following, to wit:

EXHIBIT "B."

STATE OF KENTUCKY:

Campbell Circuit Court.

Pleas before the Honorable C. J. Helm, judge of the Campbell circuit court, at the court-house, in Newport, Ky., on the 2nd day of December, 1895.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
CITY OF COVINGTON.

Be it remembered that heretofore, to wit, on the 19th day of December, 1893, the plaintiff, First National Bank of Covington, Ky., by its attorneys, filed its transcript in the clerk's office of the Campbell circuit court against the defendant, City of Covington, in words and figures as follows, to wit:

Pleas before the honorable the Kenton circuit court, at the court-house, in the city of Covington, on the 27th day of November, 1893—Hon Geo. G. Perkins, judge.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON. } In Equity.

On November 14, 1893, the said plaintiff filed the following petition and exhibits in said court:

28 Kenton Circuit Court.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON

The plaintiff, The First National Bank of Covington, Kentucky, says it is and was on and prior to the 17th of May, 1886, and hath ever since been a national bank, organized and existing under and by virtue of the act of Congress of the United States known as the national bank act and its amendments, and hath ever since its organization been and now is located and doing business in the city of

Covington, Kenton county, Kentucky; that the defendant The City of Covington is a municipal corporation *under the laws of the State* of Kentucky.

Plaintiff says that the Commonwealth of Kentucky by act of the General Assembly incorporated in 1834 the Bank of Kentucky, which by this act of incorporation and amendments thereto was authorized to engage in the business of banking for a term ending in the year 1906, and by other acts of its General Assembly it incorporated the Northern Bank of Kentucky and the Farmers' Bank of Kentucky and other banking institutions, and by said acts of incorporation and amendments thereto authorized and empowered the said banks to engage in and do a general banking business in the State of Kentucky until the said year 1906, and it says that it was provided in the various acts incorporating said respective banks that said banks should, through their respective cashiers, on the first day of July in each year during the continuance of their charters, pay into the treasury of the State fifty cents on each share of $100 in stock,
29 which should be in full of all tax or bonus.

Plaintiff says that from the year 1835 up to and including the year 1886 that, in pursuance of the contract thus made by the said State of Kentucky to and with said banks, all banks doing business in the State of Kentucky paid into the treasury of the State, in July of each and every year, a tax of fifty cents on each one of its shares of one hundred dollars, although at no time during said period was so great a rate of tax paid to the said Commonwealth upon any other species or kind of property.

Plaintiff says that, beginning with the year 1882, an effort was made to subject the property of the said bank of Kentucky and the Farmers' bank and other banks to the payment of local or municipal taxes in addition to the said tax paid to the said State, and subsequently an effort was made to subject national banks located within the said State to the payment also of local or municipal taxes in addition to the fifty cents on each share of one hundred dollars of its stock *and* that was paid to the said Commonwealth.

And it says that on and before the 17th of May, 1886, suits were pending in the courts of this Commonwealth, under the styles of The Bank of Kentucky against The City of Frankfort and The Farmers' Bank of Kentucky against The City of Frankfort and The National Bank of Paducah, Kentucky, against The City of Paducah, &c., wherein *it* was asserted by the respective municipalities the right to subject the property of the said banks to the payment of municipal taxes, and such right being controverted by the said respective banks.

30 It says that said Commonwealth of Kentucky, by an act of its General Assembly approved the 17th of May, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," and by article second thereof, under the subject of "Stocks in banks and other institutions," in view of the fact that under the contract it had entered into with said banks, whereby, upon a payment by the banks in the State of Kentucky to it annually of fifty cents on each share of one hundred dollars of their

respective stock, they were exempt from the payment of any other *tax or* bonus during and for the period ending in 1906, and in view of the said controversies then pending for judicial determination, proposed to the banks and other institutions of loan or discount within the State of Kentucky and provided as follows, to wit:

SECTION 1. "That shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

And further provided that the auditor of public accounts might, at his option, investigate the books of such banks or institu-
31 tions for the purpose of ascertaining the surplus, &c., and made said banks and institutions subject to indictment and fine for refusal to allow such investigation to be made.

And by section 2: "The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due."

And further imposed a penalty upon the cashier for failure to pay such tax, and required an affidavit from him stating the amount of capital stock, &c., of the bank and how the surplus was invested.

SECTION 4. "That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement or consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence
32 of said bank."

SECTION 5. "That said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the next General Assembly: Provided, they pay the tax provided in section 1 from the passage of this act."

SECTION 7. "If any bank, State or national, shall refuse or fail to

pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, State, county, and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or buildings owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Plaintiff avers that the terms and conditions of said act of 17th of May, 1886, were accepted by and the contract therein provided for entered into and made with the State of Kentucky by the said Bank of Kentucky, Farmers' bank, and Northern Bank of Kentucky, and by a very large majority of all the banks, both State and national, and other institutions of loan and discount in the State of Kentucky.

33 Plaintiff says that within the time provided by section 5 of said act and upon the 22 of June, 1887, at a called meeting of its stockholders, a majority in interest and of a quorum of its stockholders gave their consent to the levying of the tax thus provided and agreed to pay the same as in said law provided, and to waive and release all rights of the plaintiff under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, and authorized the proper officers of the plaintiff to so agree, consent, and waive and to make and enter into the said contract upon the part of this plaintiff to and with the State of Kentucky, and to deliver to the governor of said State a writing, under the seal of the plaintiff and executed by its proper corporate authorities, evidencing such agreement, consent, and contract to and with the State of Kentucky.

And it says that upon the 22nd day of June, 1887, it did deliver to the then governor of this Commonwealth such written agreement and consent, an authenticated copy of which is herewith filed as part hereof, marked "Exhibit A."

And it says it paid the said tax, as provided in section one of said act, from the passage of said act of the 17th of May, 1886.

Plaintiff says that upon the first day of July of each and every year since the passage of said act of 17th of May, 1886, and the making of said contract and agreement with the State of Kentucky, it has made to the auditor of police accounts the report as by section 2 of said act required, and paid into the said treasury a tax of seventy-

34 five cents on each one of its shares of one hundred dollars and on the surplus and on the excess of surplus, as by said law provided and by said contract agreed, which tax by it so paid has been accepted, received, and retained by the State of Kentucky, except the tax by it paid upon the first of July, 1893, a por-

tion of which was to it attempted to be returned, as hereinafter stated.

Plaintiff says that the rate of tax assessed by the State of Kentucky upon all other real and personal estate during the years 1886, 1887, 1888, and 1889 and 1890 was only forty-seven cents upon each one hundred dollars of its assessed valuation, and during the year 1891 and 1892 the annual rate of tax upon all other real and personal estate was only forty-two cents upon the one hundred dollars of its assessed valuation.

Plaintiff says that upon the first of July, 1893, it made its report to the said auditor of public accounts, as by said law and its contract provided, and paid into the treasury of the State the amount of tax by it owing thereon, to wit, $4,500.00, but it says that the said treasurer, claiming that the said act of the 17th of May, 1886, had been repealed, and that the contract made by this plaintiff with the State of Kentucky thereunder, although this plaintiff's corporate existence had not ceased, had been by the said State of Kentucky abrogated, and retaining $3,057.62 of the sum so paid in by this plaintiff, returned to it the balance, with the statement that it should pay a tax at the rate of forty-two and a half cents upon the one hundred dollars of the assessed value of its tangible property to the sheriff of the county of Kenton, where its said tangible property was situated, in addition to the sum so retained by him.

35 Plaintiff says that it at once notified said treasury of Kentucky that it held said balance so retained to it subject to the order of the said treasury of Kentucky, and it says that it now holds said balance so subject to the order of said treasury, and that it hath in no way consented or agreed to any repeal or change of the said act of May 17, 1886, or of its contract made with the State of Kentucky thereunder and in pursuance thereof.

Plaintiff says that the State of Kentucky, by an act of its General Assembly which becomes a law upon the 11th of November, 1892, without the signature of the governor, undertook to provide for a mode of assessing the value of what is termed "franchises of banks and other corporate institutions," and for that purpose constituted the auditor of public accounts, the secretary of state, and the State treasurer a board of valuation and assessment, and provided that the tangible property of such banks and other corporate institutions should be assessed for the purpose of State taxation by the assessor of the county where such property was situated, and undertook to require of each bank and other institutions in said act named to report to the auditor of public accounts a full statement of all its property of every kind and the value thereof, and that, said board of valuation or assessment deducting from the total value of the property so reported the assessed value of the tangible property of such bank or other institutions, that the balance should be the value of the franchise upon which such bank or other institution should pay a tax of forty-two and a half cents upon each one hundred

36 dollars into the State treasury, and should pay a tax at the same rate upon the tangible property to the sheriff of the county where assessed.

Plaintiff says it refused to make any report to the auditor of public accounts and made none under the said act of the 11th of November, 1892, but complied with, in every respect, its contract with the State of Kentucky, as aforesaid.

Plaintiff says that the said board of valuation and assessment undertook to, and did, assess and fix the valuation of the franchise of the plaintiff at $719,441.30, and it says that said board, claiming to be acting in pursuance of the directions, provisions, and requirements of said act of the 11th of November, 1892, have certified to the defendant The City of Covington, as the valuation of plaintiff's franchise upon which said defendant is entitled to collect from this plaintiff a tax for the year 1893, said sum of $719,441.30, and plaintiff says that said defendant, The City of Covington, has undertaken to assess its alleged franchise at the rate of $2.07 on the one hundred dollars for the year 1893, making the sum of $14,892.43 which the said defendant is asserting is due and owing to it by plaintiff as a tax upon its said franchise and no part of which is claimed as a tax upon the real estate owned by this plaintiff.

Plaintiff says that it has each and every year, including the year 1893, since the making of said contract with the State of Kentucky and the passage of said act of May 17th, 1886, paid to the city of Covington all taxes due and owing to it on the real estate and building owned and used by this plaintiff for *constructing* its business.

37 Plaintiff says that said defendant, on the 30th of October, 1893, demanded of it payment of said alleged *of* $14,892.43, and threatens to and will, unless restrained and enjoined by this court from so doing, destrain the property of this plaintiff for said alleged tax.

Plaintiff says that the defendant The City of Covington is not authorized by its charter to assess any of this plaintiff's property, other than its real estate or building, for taxation, and it has no authority under its charter to collect or demand any tax upon any of its property of any kind or character, except upon said real estate or building.

Plaintiff says that its franchise is not subject to taxation by defendant. It says that the defendant has no right or authority under its charter to assess or tax any of its property other than its real estate and building, and upon which it has, as before stated, paid its taxes to defendant in full.

Plaintiff says that the said act of the General Assembly of the Commonwealth of Kentucky of 11th of November, 1892, and all other laws of the State of Kentucky which attempts to subject this plaintiff or its property to a different mode of taxation than that prescribed in said act of 17th of May, 1886, and in said contract made and entered into by and between the said State of Kentucky and the plaintiff under and in accordance with said act of 17th of May, 1886, which contract has been faithfully kept and complied with by this plaintiff, or which in any way subjects this plaintiff or any of its property other than its real estate and building to taxa-

tion by the defendant, or authorizes or empowers the defend-
38 ant to subject this plaintiff or any of its property other than its said real estate and building to the payment of any tax to the said defendant, The City of Covington, are an attempt upon the part of the said State of Kentucky to violate and impair the obligation of the contract entered into by and between said State and this plaintiff, as aforesaid, and are in violation of section ten of article one of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts, and are in violation of section twenty, article thirteen, of the constitution of Kentucky in force when said act of 17th May, 1886, was passed and said contract made, and of section nineteen of the present constitution of the State of Kentucky, which was in force when said act of 11th of November, 1892, was passed, and are therefore void.

Plaintiff prays that The City of Covington, the defendant, its officers and agents, be forever enjoined and restrained from destraining or attempting to distrain any of this plaintiff's property for said alleged tax claim of $14,892.43, or from attempting to collect same or any part thereof from this plaintiff, and that said claim be adjudged invalid, and that it may have a judgment for its costs and for all proper relief.

J. W. BRYAN,
WM. GOEBEL,
Attorneys for Plaintiff.

STATE OF KENTUCKY, }
Kenton County. }

39 This affiant, Frank P. Helm, says he is president of the plaintiff, The First National Bank of Covington, Kentucky, and the statements of the foregoing petition are true, as he verily believes.

FRANK P. HELM.

Subscribed and sworn to before me by Frank P. Helm this 14th day of November, 1893.

R. K. TARVIN,
Notary Public, Kenton County, Ky.

Said exhibit is as follows:

COVINGTON, KY., *Dec.* 24, 1887.

Hon. Excellency S. B. Buckner, governor of the State of Kentucky.

SIR: We hereby certify that at a called meeting of the stockholders of the First National Bank of Covington, Ky., held at their banking-house on Wednesday, June 22, 1887 (notice of time and object of said meeting having been sent to each stockholder), there were represented 3,603 of the total 5,000 shares of the capital stock of the said bank, and, by a unanimous vote of the shares then represented, agreed and consent- to accept the provisions of the act of the

legislature of Kentucky, chapter No. 1233, article No. 2, passed at the session of 1886, approved May 17th, 1886.

A. SHINKLE, *President.*
I. D. FRY, *Cashier.*

[SEAL.]

A copy.
Attest: VIRGIL HEWITT,
Assistant and Acting Auditor.

40 At the time of the filing of the petition the following bond for costs was also filed:

Kenton Circuit Court.

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON.

We undertake that the plaintiff shall pay to the defendant and to the officers of the court all costs that may accrue to them in this action in the Kenton circuit court and in any other court to which this action may be carried.

Given under our hands this 14th day of November, 1893.

J. W. BRYAN.

Attest: H. C. HALLAM.

Thereupon a summons issued and was afterwards returned as follows:

The Commonwealth of Kentucky to the sheriff of Kenton county:

You are commanded to summon the City of Covington to answer, in twenty days after the service hereof, a petition in equity in suit No. 542 filed against it in the Kenton circuit court, at Covington, by the First National Bank of Covington, Kentucky, and warn it that upon failing to answer said petition will be taken for confessed, or it will be proceeded against for contempt.

Witness H. C. Hallam, clerk of said court, this 14th day of November, 1893.

H. C. HALLAM, *Clerk.*

Executed the within summons November 17, 1893, by de-
41 livering a true copy of same to J. T. Thomas, mayor of the city of Covington.

Fee, 60c. DAN'L KINSLEY, *S. K. C.*

At a sitting of said court on November 27, 1893, the defendant files a demurrer.

The said demurrer is as follows:

The defendant, The City of Covington, demurs to the petition because it does not state facts sufficient to constitute a cause of action, nor does it state facts sufficient to support a cause of action.

W. McD. SHAW,
City Solicitor.

Thereafter, at the same sitting of said court—

"The judge of this court declines to preside in this case on account of a personal interest in the result. By agreement, the case is transferred to the Campbell circuit court, at Newport."

Kenton Circuit Court.

I, H. C. Hallam, clerk of said court, certify that the preceding pages contain a complete and true transcript of the record in the cause named in the caption.

Witness my hand this December 15, 1893.

H. C. HALLAM, *Clerk.*

At a circuit court, on the 27th day of January, 1894, order was made in words and figures as follows, to wit:

Came the court and filed opinion herein; and defendant's demurrer to plaintiff's petition is overruled and defendant excepts.

42 The opinion referred to in the foregoing order is in words and figures as follows, to wit:

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON.

GERMAN NATIONAL BANK
vs.
CITY OF COVINGTON.

These cases are submitted upon a demurrer to the petition in each case.

The plaintiff in each case seeks to enjoin the defendant from collecting a local tax on a valuation of its franchises.

The tax in question was imposed upon a valuation authorized and made under article III of the act relating to revenue and taxation, which became a law Nov. 11th, 1892, and its collection is resisted upon the ground that this act impairs the obligation of a contract between the plaintiff and the State, whereby, upon the payment of a given tax, they are exempted from the payment of all other taxes.

If such contracts exists, whatever may be the opinion of this court as to the power of the legislature to have made them, the repeated decisions of the court of appeals of this State and of the Supreme Court of the United States sustained the plaintiffs in their contention that the tax may not be collected of them, and they are therefore entitled to the relief they pray for.

43 The contract is based upon the due acceptance, in due form, manner, and time, of the act of the legislature of this State known as the "Hewitt law," which went into effect September 14th, 1886.

That part of the act material to the question in hand is article II. The first section fixes a rate of tax on the shares of stock and surplus in State and national banks and other institutions of loan and

discount, which, in the language of the act, "shall be in full of all tax, State, county, and municipal."

The second and third sections provide the method of ascertaining the amount of stock and surplus, &c. The fourth, fifth, and sixth sections are as follows:

SECTION 4. "That each of said banks, institutions or corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxations whatsoever so long as said tax shall be paid during the corporate existence of such bank."

SECTION 5. "The said bank may take the proceeding authorized by section 4 of this act at any time until the meeting of the
44 next General Assembly: Provided, They pay the tax provided in section 1, from the passage of this act."

SECTION 6. This act shall be subject to the provisions of section eight chapter sixty-eight of the general statutes.

Section eight of chapter sixty-eight reads thus:

"All charters or grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1886, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed; provided, that, whilst privileges and franchises so granted, may be changed or repealed no amendment or repeal shall impair other rights previously vested."

On behalf of the defendant it is not denies that this act and its acceptance constituted a contract, but it is earnestly insisted that the last section above quoted constituted a part of the contract and made the contract binding upon the banks for all time, but binding upon the State at its pleasure only.

Mutuality is essential to all executory contracts; the promise of the one party is the consideration for the promise of the other; if for any reason one is not bound then neither is the other.

There is no reason why, in respect to its contracts, the State occupies any better or different position from other parties to contracts.

The plaintiff-, as national banks, surrender rights and im-
45 munities conferred upon them by the act of the Federal Congress under which they were created, and they were substantial and valuable, as set forth in the petitions herein and as known to the court as part of the current history of the State and as shown by the decisions of the court of appeals in the cases of Franklin County Court *vs.* Deposit Bank of Frankfort, &c., 87 Kentucky, 370, and City National Bank of Paducah *vs.* City of Paducah, 10 Ky. Law

Reporter, 221, and they agreed on their part to pay the increased rate of taxation, and the State agreed on its part that it would pass no law that would authorize and increase of this tax. If it did not agree to do this, it did not agree to do anything, and there is absolutely no consideration to uphold the relinquishment of its rights and privileges the banks enforced under the Federal banking laws, and the statutes which existed before the acceptance of the "Hewitt law" has not been disturbed.

The State made them a proposition limiting the time in which it might be accepted and required a formal acceptance of it. How can the court construe such a contract made by a proposition, duly accepted in all its terms, to include as one of them the right of the State at its will to fail in the consideration which alone would have induced the banks to have entered into the contract. Without this construction it was an assumption of an unerased burden of taxation or peace as to a contraversy which the subsequent decisions of the court of appeals in Franklin County Court *vs.* Deposit Bank of Frankfort demonstrated they were right and the State wrong. With such a construction it is simply an unconscionable bargain.

The act of 1856 reserves the right to repeal or amend unless a contrary interest be therein plainly expressed.

46 It is claimed that the "Hewitt law" would have been governed by it without an express reference to it, and that the reference to it must thereof be held to negative any interest to waive or relinquish the right to amend or repeal.

But in this case the very subject-matter forbids such a construction. Unless the State give immunity from other taxation during the life of the charters of the banks, they gave nothing, and the contract is not binding on the banks and as to them as if *they* had never been a "Hewitt law;" but this court will not so construe the contract. It believes to be a sound principle of law that where the legislature passes an act which cannot be operative as to some of its citizens against their will, and it asks their express written acceptance thereof, offering an inducement therefor, nothing short of the most express and implicit language will authorize its terms as required. And it is certain that a reference to a general law such as the act of 1856 made here will not do it.

Another reason why this tax may not be collected of these plaintiffs is that they are national banks.

This is not a tax on the shares of their capital stock; it is a tax on their franchises.

National banks are the instrumentalities of the General Government to provide a national currency.

To *furnish* the State to tax their franchises is to permit the States to destroy this agency of the Federal Government to accomplish the purposes of that Government.

McCullock *vs.* State of Maryland, 4 Wheat., 317.

Osburn *vs.* United States Bank, 9 Wheat., 739.

47 For these reasons the demurrer will be overruled.

And thereafter, on the 31st day of January, 1894, judgment was rendered in words and figures as follows, to wit:

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON.

The defendant declined to answer herein and, on motion of plaintiff and defendant, this cause is submitted for final judgment.

It is therefore adjudged that the defendant, The City of Covington, its officers and agents, be, and they are hereby, forever enjoined and restrained from distraining or attempting to distrain any of the plaintiff's property for said tax claim of $14,892.43, in the petition herein set forth, and from attempting to collect same or any part thereof, and that the plaintiff recover of the defendant its costs herein. To this judgment the defendant excepts and prays an appeal to the court of appeals, which is granted.

And thereupon, on the 2nd day of December, 1895, mandate was filed in words and figures as follows, to wit:

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON.

Came plaintiff and filed mandate of the court of appeals, which is as follows:

48 COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CITY OF COVINGTON
vs.
FIRST NATIONAL BANK.

Appeal from a judgment of the Campbell circuit court.

JUNE 1, 1895.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

A. A. ADDAMS, *C. C. A.*,
By ROBT L. GREENE, *D. C.*

Issued October 10, 1895.

STATE OF KENTUCKY,
County of Campbell.

I, A. L. Reuscher, clerk of the circuit court for the county and State aforesaid, do hereby certify that the foregoing 25 pages of typewritten matter and this page contain a full, true, and complete copy of the matters set out in the within-styled action as the same appears of record and remains on file in my office.

Witness my hand as clerk and the seal of said court this the 2nd day of July, 1900.

[SEAL.] A. L. REUSCHER, *Clerk.*

Exhibit "C" referred to in the foregoing bill of complaint was and is in words and figures following, to wit:

49 Whereas this the First National Bank of Covington, Ky., in 1893 instituted its action in the Kenton circuit court against the City of Covington, enjoining said city from collecting or attempting to collect any taxes from it or on its capital stock or any of its property other than its banking building, upon the ground that it had a contract with the State of Kentucky under the Hewitt law, whereby, by reason of its payment to said State of its taxes under said Hewitt law, it and its shares of stock were exempt from all other taxation, and said cause having been transferred to the Campbell circuit court, said court so adjudged and perpetually enjoined said City of Covington from asserting or from attempting in any way to collect any tax on the property of this bank or its shares of stock, except its banking building, and the City of Covington appealed from said decision to the court of appeals of Kentucky, and the said judgment of the said Campbell circuit court was by said court of appeals affirmed on June 1, 1895 (97 Ky., page 590), said court of appeals holding that this bank had such irrevocable contract with the State of Kentucky under the Hewitt law; and

Whereas it has by the Supreme Court of the United States been held in the bank tax cases from Kentucky, October term, 1898, vol. 174, U. S. Supreme Court Reports, that—

"An adjudication that an irrevocable contract exists, which precludes the enforcement of a tax law in conflict with the contract, is *res judicata* as to an attempt to enforce such tax law in succeeding years against the parties to such an adjudication;"

50 And as this bank has continued up to the present and intends to so continue to pay its taxes to the State under said Hewitt law, the said city of Covington has no right to assess for taxation its shares of stock or any of its property other than its banking building, and this bank is in no way subject to the provisions of senate bill No. 188 of the 1900 session of the Kentucky legislature, and its president and cashier are directed for these reasons not to list with the city assessor of Covington for taxation any of its shares of stock.

Exhibit "D" referred to in the foregoing bill of complaint was and is in words and figures following, to wit:

EXHIBIT "D."

COVINGTON, KY., *June* 20, 1900.

Mr. Frank P. Helm, president First national bank.

DEAR SIR: Under the late act passed by the last legislature of Kentucky, "in relation to the taxation of national banks," it is my duty to assess all shares of stock in national banks in this city.

You are hereby notified and directed to report to me on or before the 30th day of June, 1900, at my office, 153 Pike street, Covington, Kentucky, and to list with me for taxation for municipal purposes all shares of stock in the First national bank, of which you are president, for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, and 1900.

JOHN N. MIDDENDORF,
City Assessor.

51 And on the same day, to wit, on July 23rd, A. D. 1900, there issued out of the clerk's office of said court the following subpœna in chancery, viz:

The President of the United States of America to The City of Covington, a municipal corporation, and John N. Middendorf, the assessor of the city of Covington, Greeting:

You are commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal Court hall, in the city of Covington, on the first Monday in September next, to answer a bill in equity exhibited against you in our said court by The First National Bank of Covington, Ky., a corporation, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Covington, this 23rd day of July, A. D. 1900, and in the 125th year of our Independence.

Attest:

JOS. C. FINNELL,
C. C. C., K. D.

MEMORANDUM.—The defendants to enter their appearance in the suit, in the clerk's office, on or before the 3rd day of September next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

JOS. C. FINNELL, *Clerk.*

52 And on the same day, to wit, on July 23rd, A. D. 1900, a motion for injunction was filed. This motion cannot be found in the record, but there is in the record an acceptance of a notice of said motion, filed on July 25, 1900, which is as follows, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK
vs.
THE CITY OF COVINGTON.

Notice of Application for a Temporary Injunction.

The defendants, City of Covington and John N. Middendorf, city assessor of said city of Covington, are each hereby notified that the

complainant will, upon Tuesday, the 31st day of July, 1900, at 12.15 p. m., in chambers, at the Federal Court building, in the city of Louisville, Kentucky, apply to the Honorable Walter Evans, judge of the United States circuit court for the district of Kentucky, for a temporary injunction, in accordance with the prayer of the bill of complaint herein.

J. W. BRYAN,
Solicitor for Complainant.

Service of the above notice accepted for the defendants, City of Covington and John N. Middendorf, city assessor of said city of Covington.

F. J. HANLON,
Solicitor for said Defendants.

53 And afterwards, to wit, on July 27th, A. D. 1900, the subpœna in chancery issued herein on the 23rd day of July, A. D. 1900, was returned to the clerk's office of said court with the marshal's proceedings thereon endorsed in words and figures following, to wit:

"I hereby certify that I received this writ on the 23rd day of July, 1900, and that I have personally served the same, on the 24th day of July, 1900, upon the said defendants, The City of Covington, by delivering to W. A. Johnson, its mayor, a true copy of the within, and upon John N. Middendorf, assessor of the city of Covington, by delivering to him a true copy of the within on the 25th day of July, 1900. This therefore returned executed as the law directs this 23rd day of July, 1900.

Fee, $4.00.

A. D. JAMES, *U. S. M.*,
By J. D. COMPTON, *D. M.*"

And afterwards, to wit, on August 14th, A. D. 1900, an entry was made on the journal of said court, clothed in words and figures following, to wit:

Journal "H," page 660.

This day came the plaintiff, by J. W. Bryan, its counsel, and, with leave of the court, filed its amended bill of complaint herein, with an exhibit therewith attached, and moved the court for a temporary injunction restraining the defendants from assessing or collecting any taxes for municipal purposes from complainant or any
54 of its shareholders until the further order of the court. Pending said motion the defendants came, by F. J. Hanlon, W. H. Julian, and Harvey Myers, their counsel, and with leave of the court tendered and filed a plea to the jurisdiction of the court of this action, and with like leave of the court were also permitted now to file a demurrer to the bill of complaint, as amended, but neither said plea nor said demurrer was set down for argument; and the said motion of the complainant for the temporary injunction afore-

said coming on to be heard was argued by counsel, and the court, being sufficiently advised, delivered an opinion in writing, which is order- to be filed, and pursuant thereto it is ordered, adjudged, and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law and to what extent. Service of this order shall be made upon the defendants by delivering to each of them a copy hereof.

55 Said amended bill of complaint referred to in the foregoing entry was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON
vs.
THE CITY OF COVINGTON ET AL. } Amended Bill of Complaint.

The complainant, by leave of court first had and obtained, amends its bill of complaint herein as follows, to wit:

Your orator says that by mistake it was stated in its original bill that during years 1893, 1894, 1895, 1896, and up to first of July, 1897, its capital stock was five hundred thousand dollars, when the amount of its capital stock during said period was six hundred thousand dollars.

Your orator says that said act of the legislature of Kentucky of March 21, 1900, set forth in its original bill herein, is invalid and void and obnoxious to and inconsistent with the provisions of section 5219 of the Revised Statutes of the United States. Said act of March 21, 1900, is not in conformity with said section 5219 of the Revised Statutes aforesaid, in that the said act, by section two thereof, undertakes to make complainant and other national banks in the State of Kentucky liable for the taxes to be assessed against and collected upon the shares of stock thereof, and by section three of said act it is undertaken to authorize and empower the defendant City of Covington, and said defendant has the right,

56 power, and authority thereunder to assess the shares of stock of this complainant for all the years from 1893 to the present year, 1900, both inclusive, as well as in the future, and to make complainant liable for said taxes, notwithstanding the fact that com-

plainant, as in its original bill set forth, has regularly paid its taxes, as by its said contract agreed and in accordance with the provisions of the Hewitt law, each and every of said years to the State of Kentucky, and notwithstanding the fact that the capital stock of complainant was decreased from six hundred thousand dollars to three hundred thousand dollars upon the first day of July, 1897, and complainant paid one hundred dollars upon each share of said reduction of three hundred thousand dollars to the owners of the said shares of stock of complainant at said time, and that complainant hath regularly during each and every of said years semi-annually paid to its then shareholders its current earnings and profits by way of dividends, and notwithstanding the fact that many of the shares of stock of complainant have changed ownership during said years and in many instances during said time holders and owners of its shares of stock have died and their said stock has been distributed among their heirs or legatees and in other instances sold and the proceeds applied to the payment of the debts of its said shareholders, and during said years many of its shareholders were non-residents of the State of Kentucky, who in many instances have sold and transferred their shares of stock during said time. All of which statements complainant avers to be true. During said years there was no law in the State of Kentucky providing for the assessment of its shares of stock or any law authorizing municipal taxation thereof.

57 Your orator, further complaining, showeth unto your honor that said act of March 21, 1900, undertakes to and does discriminate against complainant and other national banks in the State of Kentucky and deprives them of the equal protection of the laws, for that it says that there is not now, and has not been during any of said years, any statute or law in Kentucky under which the shares of stock in State banks are to be assessed or taxes collected thereon, as is attempted to be done upon shares of stock in national banks located in Kentucky by said act; and your orator further shows that the only general law in the State of Kentucky under which the State banks are assessed for taxation is the revenue law of 1892, the provisions of which are set forth in its original bill herein, under which said State banks are assessed for and pay a franchise tax, the amount thereof being ascertained by the said State board of valuation and assessment, as in its original bill set forth. Your orator says that the legislature of Kentucky, by an act approved March 19, 1898 (Session Acts 1898, page 96, of the General Assembly of the Commonwealth of Kentucky), provided that the franchise of all banks, State and national, in cities of the first and second class, should be assessed for taxation for city purposes by such city officer as made the assessment for taxation in said cities—that is, that act conferred upon such cities the power of assessment given by the revenue law of 1892 to the State board of valuation and assessment; and your orator further shows that the legislature of Kentucky, by an act which became a law upon March 23, 1900, without the signature of the governor (Session Acts, page 89), amended said act of 1898, by which amendment it

58 was undertaken to authorize the assessment for taxation by cities of the first, second, and third class in Kentucky of the

shares of stock in every incorporated bank located in said cities, while the said act of March 21, 1900, under which the defendant City of Covington is attempting to proceed against complainant, provides for the assessment for taxation of the shares of stock of all national banks in the State of Kentucky, wheresoever located, being entitled "An act relating to taxation of the shares of stock of national banks," and while the shares of stock in State banks are assessed only in cities of the first, second, and third class in said State; and your orator says that there are many State banks located in and doing business in the State of Kentucky outside of cities of the first, second, and third class-.

Wherefore your orator says that said act of March 21, 1900, is not in conformity with, but is contrary to, the laws of the United States relating to national banks, and is a discrimination against complainant and other national banks located in the State of Kentucky; and complainant further says that said act is invalid, illegal, and void, and contrary to the provisions of the Constitution of the United States, in that it is an attempted impairment of the obligations of the contract between complainant and the State of Kentucky, and an attempted taking of the property of complainant without due process of law, and a taking of the private property of complainant and its shareholders for public use without just compensation, which is in violation of the provisions of articles V and XIV of the amendments to the Constitution of the United States, and an attempt
59 to enforce said act of March 21, 1900, would be an abridgement of its privileges and immunities and a denial to it of the equal protection of the laws, and in violation of article XIV of the amendments to the Constitution of the United States.

And your orator files herewith as part of this and its original bill, as evidence in this case, a certified copy of all the orders, the judgment, and opinion and holding by the court of appeals of Kentucky, upon the said appeal by the defendant herein, City of Covington, against complainant, referred to in complainant's original bill, and marks said copy Exhibit "X."

Wherefore your orator prays your honor to grant unto it the injunction asked for in its original bill, restraining and enjoining the said City of Covington and all of its officers from in any way assessing or attempting to assess for taxation by said city the shares of stock of complainant or any of them, or to hold complainant liable for the taxes thereon for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, and 1900, or any of said years, or for any future year or years, and prays that it be adjudged that the contract entered into by and between it and the State of Kentucky, whereby its shares of stock and all of its property other than its banking building and real estate are exempt from any taxation by the defendant City of Covington for and during its corporate existence, was an irrevocable one, and that such contract is irrevocable, is *res judicata;* that said act of the legislature of Kentucky of March 21, 1900, be declared illegal, null, and void in whole and in part; that it may have judgment for its costs. It prays as in its original bill and for any

60 and all other and further relief that to it in equity and good conscience belongeth in the premises.

J. W. BRYAN,
Solicitor for the Complainant.

UNITED STATES OF AMERICA,
State of Kentucky, County of Kenton, } ss:

Frank P. Helm makes oath that he is the president of The First National Bank of Covington, Ky., complainant herein, and that the statements made in the foregoing amended bill of complaint as of his own knowledge are true, and those on information he believes to be true.

FRANK P. HELM.

Sworn to and subscribed before me by Frank P. Helm on the 9th day of August, 1900.

R. K. TARVIN,
Notary Public, Kenton Co., Ky.

My commission expires Jan'y 8th, 1902.

Said exhibit referred to in the foregoing amended bill of complaint was and is in words and figures following, to wit:

EXHIBIT "X."

Pleas before the honorable court of appeals of Kentucky, at the capitol, in Frankfort.

61 At a court of appeals held in and for the Commonwealth of Kentucky, as aforesaid, on the 25th day of October, A. D. 1894, the following order was entered herein:

CITY OF COVINGTON
vs.
FIRST NATIONAL BANK OF COVINGTON. } Campbell.

Ordered that the foregoing causes be continued for oral argument.

Afterwards, to wit, on the 5th day of March, A. D. 1895, the following order was made herein and in consolidated causes:

By agreement of all the parties and on their motion, it is ordered that these 17 causes be heard together; and said causes, coming on to be heard, were argued by A. P. Humphrey, for the banks, and Ira Julian, for the Commonwealth, counties, and cities, and laid over until tomorrow for further hearing.

Afterwards, to wit, on March 6th, A. D. 1895, the following order was entered herein and in the consolidated causes:

These causes, again coming on to be heard, were argued by D. W. Lindsey, for the banks, and Wm. McD. Shaw and Hugh Rodman,

for the counties and cities, and laid over for further hearing on tomorrow.

Afterwards, to wit, on March 7th, A. D. 1895, the following order was entered herein and in the consolidated causes:

62 These causes, again coming on to be heard, were argued by William Goebel, for the banks, and H. C. Barker, for the cities and counties, and laid over for further hearing on tomorrow.

Afterwards, to wit, on the 8th day of March, A. D. 1895, the following order was made herein and in the cases consolidated with it:

These causes, again coming on to be heard, were argued by John W. Rodman and T. L. Edelen, for the banks, and laid over for further hearing on tomorrow.

Afterwards, to wit, on the 9th day of March, A. D. 1895, the following order was entered herein and in the cases consolidated herewith:

These causes, again coming on to be heard, were argued by James P. Helm, for the banks, and laid over for further hearing on next Tuesday.

Afterwards, to wit, on the 12th day of March, A. D. 1895, the following order was entered herein and in the causes consolidated herewith:

These causes, again coming on to be heard, were argued by W. J. Hendrick, for the Commonwealth, and submitted.

Afterwards, at a court of appeals held, as aforesaid, on the first day of June, A. D. 1895, the following judgment was entered:

63 CITY OF COVINGTON, Appellant,
vs.
FIRST NATIONAL BANK OF COVINGTON.

Appeal from Campbell circuit court.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

Judges Lewis, Paynter, and Guffy dissenting.

The following is a copy of the opinion delivered by the court, through Chief Justice Pryor, on the 1st day of June, 1895:

The Bank of Kentucky, the Northern bank, the Farmers' bank, and other State banks, the National Bank of Covington, and other national banks are in this court by their presidents and directors, some of them appealing from judgments imposing upon them taxa-

tion for county and municipal purposes, and others standing as appellees in cases relieving them from such local burdens.

The legislation imposing such burdens is found in the Kentucky statutes under the title of revenue and taxation, and is based on secs. 174 and 175 of the present constitution.

Section 174 provides:

"All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this con-
64 stitution shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises."

Section 175 provides:

"The power to tax property shall not be surrendered or suspended, by an- contract or grant to which the Commonwealth shall be a party."

It is manifest by reason of section 175 the right of the legislature no longer exists of surrendering the power to tax property, or by contract to bind the State to any other mode of taxation than that found in the constitution, and all property, whether belonging to corporations or individuals, must pay the same rate of taxation.

The appellants in these cases (the banks) are claiming that prior to the adoption of the present constitution a contract had been entered into between them and the State, by which, in consideration of the surrender by them of certain rights found in their respective charters, and by their consent and agreement to pay a larger State tax than individuals paid or their charters required, the State agreed not to impose upon them any local burdens, and the important inquiry in these cases is, Was such a contract entered into between the banks and the State based on a consideration binding the State on one side and the banks on the other?

The statute under which this contract is claimed to have been made is found in the general statutes, under the title of revenue and taxation, secs. 1 and 4 of art. 2, and known as the Hewitt bill. Counsel for the banks in the discussion of these cases classified the banks as follows: 1. The banks chartered prior to the act of 1856, when the power to amend or repeal was not a part of the charter or reserved by any general law. 2. Banks chartered after that
65 date, when by a general law the right to amend or repeal the charter was expressly reserved. 3. The national banks. We shall treat all the cases as one in considering the application of the Hewitt act to the banks accepting its provisions.

Prior to the adoption of the present constitution it seems to have been the settled policy of the State to exempt banking institutions from local taxation and requiring them to pay a larger tax to the State upon its property than that paid by the individual tax-payer, and this additional tax went into the State treasury instead of being applied to municipalities in the discharge of local burdens. The framers of the constitution, not approving of this policy, established a fixed rule of taxation and made all taxation alike upon property,

whether for State or municipal purposes, applying the rule for municipal purposes to the territory in which the tax is imposed. It is argued, and no doubt true, that a discrimination must exist between banks located where heavy local burdens are imposed and like institutions in more favored localities where lighter or no local burden exists, and while the fact that the banks in the commercial centers of the State are taxed two and a quarter dollars on the hundred under the present system (local and State) and those in an adjoining town or county only one per cent. may work a hardship and prevent competition or drive the banks thus heavily taxed to locate elsewhere, yet this under the old system was a question of policy only, and the farmers of the present constitution in adopting the ad valorum system left no room for classifying property, so as to make any discrimination in the subjects of taxation, and the suggestion of counsel can only be considered in determining the intent of the legislature in passing the Hewitt act and that of the banks in accepting it.

66 It may be well, however, to ascertain the condition of the banks (and particularly those chartered before the year 1856) with reference to taxation and the circumstances attending the legislation resulting in the passage of the Hewitt bill in order to ascertain whether or not it was the purpose of the State to surrender in part its power of taxation and that of the banks to relinquish any right they could have asserted against the State by reason of their charters. The banks in existence prior to the act of 1856 were claiming their charter contracts, by which only a tax of fifty cents on each share of one hundred dollars of stock could be imposed.

The national banks claimed they were entitled to be taxed like the State banks and were not liable for local burdens, and, besides, that their surplus, if in greenbacks or other non-taxable securities, could not be taxed under their charters from the Federal Government.

The State claimed the old banks were taxed for too small an amount, and the banks chartered since the year 1856 were resisting any discrimination between such institutions and the old banks. Under these circumstances the legislature devised a mode of taxation that prevented a discrimination that would otherwise exist, and by the provisions of the Hewitt bill said to all banks, State and national, we will impose a tax of seventy-five cents on each share of your capital stock equal to one hundred dollars, and, in addition, a tax on your surplus, and this shall be in full of all tax—State, county, and municipal—provided you will accept the act imposing the tax with the conditions annexed.

This act reads:

67 "Shares of stock in State and national banks and other institutions of loan and discount, and in all corporations, required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars of stock therein, owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay on each one hundred dollars of so much of their surplus, undivided

surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The seventh section of the act further providing that—

"Nothing herein contained shall be construed as exempting from taxation for county or municipal purposes, any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of this act provides:

"That each of said banks, institutions and corporations, by its proper corporate authority with the consent of a majority in interest of a quorum of its stockholders at a regular meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement with the State of Kentucky shall be evidenced by writing under the seal of such bank, and delivered to the governor of this Commo-
68 wealth, and upon such agreement and consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid, during the corporate existence of such bank."

Section 5 of this act provides:

"The said bank may take the proceedings authorized by sec. 4 of this act, at any time, until the meeting of the next General Assembly: Provided, they pay the taxes provided in sec. 1 from the passage of the act."

Section 6 provides:

"This act shall be subject to the provision of section 8, chap. 68, General Statutes."

The banks involved in this litigation accepted in writing the provisions of the act and filed their written acceptance with the governor under their corporate seals. The banks incorporated before the act of 1856 surrendered what they claimed to be their charter contracts, by which they were taxed only fifty cents on their shares of stock of one hundred dollars. The national banks yielded their right to deduct from the value of their stock their surplus consisting of non-taxable securities and their claims to be taxed as the old banks, and most of the State banks uniting to prevent any discrimination, all accepting the proposition made by the State and agreeing to pay seventy-five cents on each share of stock of one hundred dollars in value and the additional tax mentioned in the article.

It is conceded by counsel for the City of Louisville (and we think it clear) that prior to the passage of the Hewit bill, in the
69 year 1886, the Bank of Kentucky had an irrevocable contract to be taxed at the rate of fifty cents on each share of one hundred dollars, and the same may be said of all the banks chartered prior to the act of 1856; but it is further contended that the

act as well as the contract under it were both subject to repeal by reason of the reserved power contained in sec. 6 of art. 2. Again, it is contended by counsel for the city of Frankfort that the grant to the banks was without any consideration, and the renewals of the charter of the old banks, as they are designated, placed them within the provisions of the act of 1856, and by the attorney general that the State had no power to surrender this right of taxation, and the contract, if made, is not binding.

This court in the case of The Franklin County Court *vs.* Bank of Kentucky, reported in 87 Ky., 370, in an opinion delivered by Chief Justice Bennett, held that the renewals of those charters did not affect the contract made with the State under the original grant; and if disposed to reconsider the decision rendered in that case, it could not affect the issue involved on the present appeals. At the date of the passage of the Hewitt bill the Franklin circuit court had decided that the charter contract still existed, and after the acceptance by the banks of the provisions of the Hewitt bill that court affirmed that judgment. It is apparent that art. 2 in the Hewitt bill was adopted by the legislature with a view of equalizing the burdens of taxation as between the banks and to relieve them from the burden of local taxation during their corporate existence, but it is insisted there was no consideration for this partial exemption.

If there was a binding contract between the old banks and
70 the State to pay a tax of only fifty cents on each share of stock and these banks surrendered their contract or their right under it and agreed to pay seventy-five cents to the State instead of forty-two and one-half cents, it seems to us this would be a wise consideration, sufficient to uphold any such contract with the State, if the power existed with the State to make it, and the fact that such power existed has been too often decided by this court, as well as the Supreme Court, to require authority in support of it. It is plain also that these banks, including the national banks, surrendered their rights not only to settle the question as to local taxation, but to prevent competition or any discrimination between banks located in the commercial centers of the State and those outside of such localities, while no heavy burdens for local taxes were being levied, and therefore the consideration moving from the old banks was for the benefit of all the banks accepting the terms of the contract. The legislature was attempting to avoid all discrimination between these monied institutions, and therefore its exactions from the old banks and the national banks being acceded to, it resulted to the benefit of the banks organized after as well as before the act of 1856, as to such banks uniting with the old banks in accepting the Hewitt bill. In this statute, imposing the tax of seventy-five cents and its acceptance on the conditions proposed, there exists every element of a contract between the State and the banks, and with such a consideration as will uphold it no reasonable doubt can be entertained that such was the purpose of the parties to it.

It is contended that if a contract was entered into the provisions

of the present constitution and subsequent legislation under
71 it operated to repeal not only the statute, but the contract made by virtue of its provisions, and this power existed by reason of the sixth section of the article, making it subject to the provisions of sec. 8, chap. 68, General Statutes, declaring that this—

"Shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Assuming, as we think was the legislative intent, the word act in section 3 of the Hewitt bill was used as synonymous with the word article, and therefore the reservation of the power on the part of the legislature was the right to amend or repeal the article in which is contained the proposition by the State to the banks in reference to taxation, it by no means follows that a contract made by virtue of its provisions can be abrogated at the will and pleasure of the legislature. The distinction between the power of the legislature to repeal an act and the right to annul, by repeal or otherwise, a contract made under it is manifest, and while under our present constitution the State can make no contract by which the exercise of the taxing power can be lessened or any part of its sovereign power in that regard relinquished, under the former constitution property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation, and this doctrine has been recognized by numerous decisions of this court and sustained in like cases by numerous
72 decisions of the Supreme Court.

The general rule in regard to legislation is that one legislative body cannot bind a subsequent legislature to its action in purely legislative matters, but when it comes to matters of contract, if the State hath the power to make it, its terms and conditions are as obligatory on the State as if entered into between two of its citizens, and an attempt to cancel such a contract, without the consent of the party with whom it is made, is in direct violation of that clause of the Federal Constitution providing that "no State shall * * * pass any law impairing the obligation of contracts" (section 10, art. 1, U. S. Const.).

That the State may enter into such contracts was held by this court as early as the year 1839, in the case of Johnson *vs.* Commonwealth, reported in 7 Dana, 342, where there was an effort to tax the shares of stock in a bank in excess of the terms of the contract, and this court held that the contract placed a limitation on the power.

In the case of the Farmers' Bank *vs.* Commonwealth, reported in 6 Bush., 127, it was held the bank could not be taxed beyond its charter rate as fixed by the contract, and in the late case of The City of Frankfort *vs.* The Bank of Kentucky and others, reported in 87 Ky., 370, the same doctrine was announced.

The question then arises, Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legis-

lature or the farmers of the Constitution to disregard this contract between the banks and the State? We are satisfied, after a careful consideration of this question, that the parties making it
73 never contemplated or intended that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties. The legislature at the time this contract was made recognized the right of the Bank of Kentucky and the banks chartered prior to 1856 to stand upon their charter rights, or, if not, the right of the banks as against the State or this subject of taxation had found its way to the courts and had been decided adversely to the State. The legislature thought the tax of fifty cents too small. The old banks claimed an irrevocable contract. The national banks could only be taxed as authorized by the Federal Congress. The new State banks were subject to such taxation as the State might see proper to place upon them, and to make them liable for these local burdens would be to end their existence or cause them to seek shelter under the Federal banking act, and with a view of placing the entire matter at rest and placing the banks on an equal footing the legislature said to all of the banks:

"If you will agree to pay seventy-five cents on each share of stock equal to one hundred dollars, etc., it shall be in full of all tax, State, county, or municipal."

It said to the old banks:

"You must relinquish your right to a smaller rate of tax, and this must be done, not by your president and directors, but by the consent of the stockholders in writing and delivered to the governor as evidence of your good faith."

The banks accepted the proposition made them in the manner pointed out by the act, and from that time to the adoption of the present constitution the contract was adhered to by both the
74 State and the banks. It is now argued the banks, and particularly those with charter contracts for a smaller rate of taxation, surrendered those charter rights and agreed to pay a higher rate of tax under an act that authorized any subsequent legislature to repeal the contract at its will and pleasure. No rational view of this agreement should lead to the conclusion that business at the head of these institutions would relinquish every right they had required under their charters that an increased burden might be placed upon the banks they represented.

In the contention that the sixth section of the article reserves this power of repeal counsel overlooked the fact that by the express terms of the section by which this reserved power is retained it is provided that "no amendment or repeal shall impair other rights previously vested." The execution of the agreement between the State and the banks, based on a consideration such as appears from the act itself, connected with its acceptance by the banks, vested in the latter rights of which they could not be divested without their consent, the chief of which was the payment of a specified tax to the State during their corporate existence.

The State waived its right to tax these banks for local purposes

(except their realty), and required in lieu thereof an additional tax to be paid into the State treasury. In this way the State granting the franchise derived the benefit instead of the municipal government, while under the present system the difference between forty-two and one-half cents and seventy-five cents, with tax on surplus amounting to one hundred and twenty-five thousand dollars, is taken from the revenue proper and applied to the mu-
75 nicipalities where the banks are located.

In the case of Commissioners of Sinking Fund *vs.* Green & Barren River Navigation Company, reported in 79 Ky., 73, this court held, with the act of 1856 in full force, that the State had no power to annul a contract that had been executed between the State and the company, and that the repeal of the charter to the extent — it deprives the company of its contract rights acquired under it was in violation of the constitution. In that case the court said:

"We cannot assent to the doctrine that will allow the State to alter or abolish such contracts whenever, in the opinion of the legislature, the necessities of the public or the interest of the State require it."

The case of The Commonwealth *vs.* Owensboro, &c., R. Co., 95 Ky., 60, determines, in effect, the question involved here. In the year 1884 the legislature passed an act to encourage the construction of railroads, and in doing so relieved them from taxation for a limited period. The act provided:

"That all railroads which may hereafter be built within the Commonwealth under existing charters, or under charters which may hereafter be granted, shall be exempt from all taxation under the laws of this Commonwealth for the period of five years, from the date of the beginning of the *constitution* of the new roads."

The State claimed the right under the act of 1856 to repeal the law, claiming this had been done by legislation, as in the case before us, and attempted to coerce payment of taxes when the five years from the beginning of the construction of these roads had not ex-
pired.
76 The court, in response to the argument to exact the tax and the application of the act of 1856 to its provisions, said:

"It is sufficient to say of this proposition, which, even at first blush, strikes us as extraordinary and unjust if attempted to be applied to those of the appellees who accepted the offer of the State and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges granted by the legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law and affected all alike who accepted its provisions or acted on the strength of them."

Counsel for the local governments argued the questions involved as if there was a perpetual grant to these corporations, and therefore the power of repeal must of necessity have been reserved. The limitation of the grant extends to the life of the corporate charter, and with the banks existing prior to the act of 1856 their charters expire in ten or twelve years, and hence the policy of the State, if

viewed in that light, was wise, because it was increasing the State revenue from fifty to seventy-five cents for a fixed and certain period.

The framers of the constitution, in adopting that instrument, were not looking to past legislation on this particular subject, but were creating an original law for the future welfare of the State, leaving the rights of those protected by either the State or Federal constitutions undisturbed, and if the attempt to repeal vested rights had been made, the *far*mers of the present constitution would have been as powerless to accomplish such a purpose as the legislature
77 in session after its adoption.

The Supreme Court decided a somewhat similar question on a writ of error to the court of appeals of New Jersey in the case of New Jersey *vs.* Yard, reported in 95 U. S., 110. By an act of the legislature passed in March, 1865, the legislature of New Jersey enacted that the Morris & Essex Railroad Company should pay a tax of one-half of one per cent., to be paid by the company to the State whenever the net earnings of the company amount to seven per cent. on the cost of the road, to be paid at the expiration of one year from the time when the road shall be open and in use to Phillipsburg and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation and imposition whatever by or under the contracts of this State.

The twentieth section of the original act of incorporation reserved to the legislature the right to alter, amend, or repeal the act whenever it should think proper. The act of 1865 was an amendment to the original grant, and in regulating the amount of taxation contained this proviso:

"Provided, that this section shall not go into effect, or be binding on the company, until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the secretary of state, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

Chief Justice Miller, in delivering the opinion in that case, said: "The main question here is, Did the legislature intend to make such a contract?" and held that "its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a con-
78 tract which would be protected by the Constitution of the United States." And in like manner will the contract in question be upheld.

And, as said Mr. Justice Miller in New Jersey *vs.* Yard:

"The legislature was not willing to rest this contract in the usual statutory form alone, depending on its validity as a contract upon some action of the corporation under it to bind it to its terms, but they required of the company a formal written acceptance within sixty days, else it became wholly inoperative."

And it may be said in the New Jersey case there was no consideration other than is found in ordinary railroad charters.

It is said, however, in that case the repealing clause, or what is known in this State as the act of 1856, was appended to the original

charter, and when amended it formed no part of the amendment, as is found in this case, and therefore the court concluded the amendment was not subject to repeal.

The question is asked, Why the necessity of making the act of 1856 apply to article 2 if the legislature did not intend to reserve the right of annulling the contract? In response to this it might be asked, If such was the legislative intent, why the necessity of having a formal written acceptance from the banks, surrendering all their respective charter rights, and in consideration therefor agreeing to tax them seventy-five cents on the hundred dollars so long as their charters continued, if the power was reserved of abrogating the contract at any moment? If such was the legislative purpose, there
79 could have been no necessity for any consideration moving from the banks or any formality attending the execution of the contract.

The act of 1856 was enacted to avoid the effect of the decision of the Supreme Court in the Dartmouth College case, reported in 4 Wheat., 518, to enable the sovereign power to amend and repeal charter provisions that had theretofore been regarded as beyond the power of the legislature without such a reservation, but under this act of 1856 it has been held by this court, as well as every other court having the question before it, that property rights or contract rights acquired by virtue of the charter in exercising the privileges conferred could not be interfered with by legislation, and in fact the act expressly provides "that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The old banks had contract rights, sustained by the adjudications of the court of the State, that exempted them from local taxation, and the same adjudication was had in regard to national banks, although the cases as to the national banks were decided subsequent to the passage of the Hewitt bill (City National Bank of Paducah *vs.* The City of Paducah, 10 Ky. L. R., 221; Covington City National Bank *vs.* City of Covington, 21 Fed. Rep., 484).

The legislature saw the obstacle in the way of increasing the taxation on these banks, and, the national banks standing on the same footing with the State banks, it became apparent that it was to the interest of the State to hold out inducements to all the banks that equality as between them might exist, and at the same time increase the taxation. The banks had not asked for any amendments
80 to their charters, nor was the effort made by the legislature to repeal or amend the charters. The State was attempting to enact a general law, entitled revenue and taxation, applying to all subjects of taxation and to all kinds of property. The tax in regard to banks, under this general title, was fixed at seventy-five cents as to all banks, and as to all corporations, required by law to be taxed on their capital stock, and as to the old banks and the national banks the surrender of these rights was made to depend upon their acceptance of the proposition made to them by the State, by the terms of which they were to pay the tax imposed by the

Hewitt bill and be released from other taxation so long as their charters continued.

Why, then, did the legislature annex to article 2 of the revenue bill the provisions of the act of 1856? No contract had been made when the bill passed, as there had been no acceptance by the banks, and not until the adjournment of the legislature was the contract consummated. It was provided in article 2 that the acceptance had to be made before the legislature again assembled, and the act of 1856 could only have authorized the reservation of power to repeal or withdraw this proposition if, within the period fixed, there was no acceptance by any of the banks of its provisions.

The right to the franchise or the exercise of the privileges granted was not involved in the legislation, but the banks, with their charters in full force, were asked by the legislature to make an agreement as to a rate of taxation that could not have otherwise been enforced against either the old banks or the national banks.

The corporations had the right to contract by reason of their charters, and, dealing at arm's length with the State, accepted
81 the terms and conditions offered in good faith, and the question here is, not the right of the State to repeal or amend their charters, but the right of the State to cancel this contract without the consent of the banks.

The right of the State to repeal the franchise or amend the charter is not here questioned when subject to the act of 1856, but the repudiation of a contract will not be sanctioned.

There was, in fact, necessity for the State to apply the act of 1856 to article 2. Other corporations, as well as banks organized since 1856, were liable to this tax, whether they accepted the provisions of the Hewitt bill or not, and section 4 was inserted for the express purpose of creating a contract between the old banks and the national banks on the one side, and the State on the other, by which the taxation on these banks might be increased, and at the same time placing all the banks accepting its terms on the same footing. If no acceptance had been made there was no reason why the act could not have been enforced as against these corporations coming within the act of 1856; but neither the banks nor the State ever intend- to perform such an idle act as entering into this solemn agreement that might be disregarded by the State whenever its representatives saw proper.

The rule is, if a statute is susceptible of two constructions, that which is consistent with public policy will be followed and no meaning given a statute that will lead to an absurdity.

The case before us is much stronger for the banks than that of New Jersey *vs.* Yard. Here the old banks had contract rights,
82 sustained by the adjudication of the courts of the State, to the effect that they were not liable to local taxation, and the same adjudication followed in reference to national banks. The contract was not only executed, but based on a valuable consideration. If there were any doubt as to its meaning, that doubt would be construed for the State; but when considering the entire article, the intention of the legislature, it seems to us, is manifested. This

increased tax under the former constitution, as before stated, went to the State and not to the municipalities. Such was the policy of the State when the contract was made, and we perceive no reason for abrogating its terms, so as to withdraw from the State treasury this additional tax the banks have been paying, amounting to $125,000 annually, and transfer it to the cities to aid in discharging local burdens.

It requires no judicial utterance to show that under the national banking act, where the rate of interest is fixed at six per cent. (or as the State law provides) and a forfeiture of the entire interest if more is charged, that these banks, by the imposition of local burdens, cannot be taxed as much as two and one-half per cent. in any locality when the average taxation of State banks will not exceed half that sum.

In the case of Lionberger *vs.* Rouse, reported in 9 Wall., 468, after the national banking system went into effect, the legislature of Missouri passed a law authorizing the banks of issue in that State, ten in number, to enter into the new system. Eight of those banks became national banks and two of them declained to do so. The two old banks, as the Supreme Court of the United States held in that case, had a contract right with the State not to be taxed exceeding one per cent. and the State was powerless to increase this tax.
83 The assessment of the plaintiffs' shares of stock in the national bank was at the rate of nearly two per cent. It was contended that this was an unjust discrimination in favor of the two State banks, and the Supreme Court said: As the national bank or its shares was not taxed for a greater sum than other moneyed institutions of the State, and the State was powerless to change its contract with the two remaining banks of issue, it was not such a discrimination as would authorize the court to interfere.

While there are exceeding sixty State banks, the Bank of Kentucky and its branches, the Northern bank and its branches, the Bank of Louisville, and the Farmers' Bank of Kentucky and its branches were at the time of the passage of the Hewitt bill and are now regarded as the prominent banking institutions of the State, and if with their capital and business rank placed before the Supreme Court, with a tax of only one per cent. and the tax on the national banks placed at two per cent., the judgment of the Supreme Court upon such a state of fact doubtless would have been similar to the decision of the court in the case of The National Bank *vs.* The City of Paducah, 10 Ky. L. R., 221.

The case of Lionberger *vs.* Rouse, 9 Wall., 468, has no bearing on this question of contract. Here the State was not powerless to remedy the evil or prevent the discrimination complained of in the Missouri case. The legislature devised a mode by which this discrimination could be removed, however great or even insignificant the difference in taxation might have been. The national banks, recognizing the fact they could be taxed as other moneyed capital and desiring uniformity of taxation and not one rate for one bank and a
84 different rate for another, surrendered their right or claim to be taxed as the old banks were taxed and entered into this

agreement by which a uniform system of taxation was adopted for all banks, such as the State desired.

The claim of the old banks and the national banks as to the mode of taxing them was certainly not without foundation for the reasons already given, and the proposition by the legislature to settle these differences, and its acceptance, was a wise and just solution of the whole question.

The case presented by this legislative repeal is the opposite of the legislation in the Missouri bank causes. In the one case there was no legislation making the discrimination, while in the case before us the State, after placing the banks, State and national, on the same footing as to taxation, by the consent and agreement of all the parties to the contract, is now insisting upon a legislative re-cission of the contrary, and placing the old banks at least in a position where they are to pay only fifty cents on the shares of a hundred dollars, and leaving the national bank subject to a greater rate of taxation.

This repeal, *is* sustained, is in effect the creation of three or more new banks, with a rate of taxation much less than that imposed on the national banks, and making a discrimination in favor of the old banks and their branches that gives them a monopoly of the banking business of the State.

The old banks, with a capital of five millions at the time the Hewitt bill passed, will be relegated to the condition they were when the contract was made, as was held by the Supreme Court in the case of The Water Company *vs.* Clark, reported in 143
85 U. S., 1, and that is an exemption from local burdens with a tax of one-half of one per cent. to the State. The national banks, with a capital of ten millions when the Hewitt bill was enacted, and now increased to twenty millions, will also be exempt from local burdens, because the State, in the exercise of the power it now claims, had abandoned the contract under which taxation was equal and uniform, and voluntarily made an unjust discrimination when in its power to prevent it. Such consequences would be disastrous to both the State and the municipalities, the State losing the increased tax, and the municipalities (or the legislature for them) without power to impose on national banks local burdens.

The banks have all, practically, accepted the provisions of the Hewitt bill, and the legislation repealing or canceling the contract, being in violation of both the State and Federal constitutions, leaves the Hewitt bill, as to the banks, in full force, and they must be taxed under its provisions until the contract terminates.

These moneyed institutions are now paying, including tax on surplus and realty, eighty cents, or about that sum, on each share of stock of one hundred dollars, while the citizen tax-payer is paying only forty-two and one-half cents, and at last it is a question whether this difference in the taxation is to be paid by the banks into the State treasury, as under the old constitution, or to the municipalities, under the new constitution.

In the absence of this contract it would go to discharge local burdens, but with this contract in full force it must be paid, as to the

amount and manner, as provided by the Hewitt bill of 1886, into the treasury of the State.

It results, therefore, that the judgments in the case of The Louis-
86 ville Banking Co. *vs.* City of Louisville, Third National Bank *vs.* City of Louisville, Northern Bank of Kentucky *vs.* Bourbon County, Deposit Bank *vs.* Franklin County, Bank of Kentucky *vs.* Armstrong, Bank of Kentucky *vs.* City of Frankfort, Farmers' Bank *vs.* City of Frankfort, Same *vs.* Franklin County, and Same *vs.* City of Henderson are reversed, and The City of Louisville *vs.* Bank of Kentucky, Commonwealth *vs.* State National Bank, Same *vs.* Frankfort National Bank, Same *vs.* Deposit Bank, Same *vs.* Bank of Kentucky, City of Covington *vs.* German National Bank, Same *vs.* First National Bank, and Commonwealth *vs.* Farmers' Bank are each and all affirmed.

COMMONWEALTH OF KENTUCKY:

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the foregoing twenty-five pages and this page contain true and complete copies of all the orders and judgment and the opinion of said court of appeals in the case of City of Covington, appellant, against First National Bank of Covington, appellee, lately pending in said court, as the same appear of record in my office.

Witness my hand and seal this 31st day of July, 1900.

SAMUEL J. SHACKELFORD, *Clerk*,
By ROB'T L. GREENE, *D. C.*

Fee, $8.75.

87 And on the same day, to wit, on August 14, A. D. 1900, came the defendants, by their attorneys, and filed their joint and several plea herein. Said joint and several plea was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

The joint and several plea of The City of Covington and John N. Middendorf, assessor of said city, to the bill of complaint of the First National Bank of Covington, Kentucky.

These defendants (by protestation, not confessing any of the matters in said bill contained to be true in manner and form as the same are therein set forth, do plead thereunto and) for cause of plea say that heretofore, to wit, on the day said complainant exhibited its present bill of complaint in this honorable court and before and continuously since then it was and is a resident of the district of Kentucky, and that both defendants to said bill are and were residents of said district.

Wherefore defendants say this court has not jurisdiction of this cause of action nor them, the defendants.

F. J. HANLON,
HARVEY MYERS,
Solicitors for Defendants.

W. H. JULIAN, *Counsel.*

88 And on the same day, to wit, on August 14, A. D. 1900, came the defendants, by their counsel, and filed their joint and several demurrer herein. Said joint and several demurrer was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
CITY OF COVINGTON ET AL.

The joint and several demurrer of The City of Covington, Kentucky, and John N. Middendorf, assessor of said city, defendants, to the bill of complaint of the First National Bank of Covington, Ky.

These defendants say they are advised that there is good cause of demurrer to said bill, and they do demur accordingly, and for cause of demurrer say that said bill contains no matter of equity whereon this court can ground any decree or give complainant any relief as against these defendants. Wherefore these defendants do demur thereto and crave judgment of the court whether they shall make answer to said bill otherwise than as aforesaid, and they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. H. JULIAN,
F. J. HANLON,
HARVEY MYERS,
Solicitors for Defendants.

89 I hereby certify, as counsel for defendants in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

F. J. HANLON.

The defendant John N. Middendorf makes oath that the foregoing demurrer is not interposed for delay of the cause in which it is filed.

JOHN N. MIDDENDORF.

Subscribed and sworn to before me by said John N. Middendorf this 30th day of July, 1900.

J. M. MAHON,
Notary Public, Kenton County, Ky.

My commission expires March 4th, 1902.

And on the same day, to wit, on August 14, A. D. 1900, the court filed its written opinion referred to in the foregoing entry. Said opinion was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY., vs. CITY OF COVINGTON ET AL. } Opinion.

The complainant brings this action to enjoin the City of Covington and its officers from assessing and collecting for municipal
90 purposes the taxation on its shares of capital stock provided for in the act of the General Assembly of Kentucky, approved March 21, 1900, entited "An act relating to the taxation of shares of stocks of national banks," which is as follows:

"Whereas the Supreme Court of the United States has lately decided that article three chapter 103 of the Acts of 1891, 1892, 1893, is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in 1892, any adequate mode of taxing national banks, while State banks are now and have been ever since 1892, taxable for all purposes, State and local; therefore—

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

SECTION 2. For the purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

SECTION 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; provided, that where any national bank has heretofore for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of 1892, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this

act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

SEC. 5. The assessment of said shares of stock and collection of taxes thereon, as contemplated by this act may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

91 SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three of the revenue law and said decision of the Supreme Court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes an emergency exists, and this act shall take effect and be in force from and after its passage."

To clearly understand the scope of this very important controversy it is necessary to say that in 1886 in an effort to remedy the confusion growing out of certain unrepealable provisions in the charters of the older banks in regard to taxes, the legislature passed what is commonly called the Hewitt act, the pertinent provisions of which are as follows:

"SECTION 1. That shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75c. on each share thereof, equal to $100, or on each $100 of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall in addition, pay upon each $100 of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, which shall be in full of all tax, State, county and municipal.

* * * * * * *

SEC. 4. That each of said banks, institutions and corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such banks."

This rate of taxation, all the avails of which went to the State, was higher than that paid by other property, but on that account the banks were exempt from local taxation.

92 In 1892 the legislature enacted what is now section 4077 of the Kentucky Statutes, as follows:

"SEC. 4077. Every railway company or corporation and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchises, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require."

Section 4078 prescribed the manner of ascertaining the value of the franchises to be assessed. As a basis for this assessment, banks, under section 4092, were required to make reports on the first day of March of each year of their condition the preceding 31st day of December, and to pay the tax on July 1st following. This subsequent legislation was intended to repeal, and in express terms did repeal, the Hewitt law. After the enactment of the legislation last referred to, the complainant, in November, 1893, instituted an action in the State court to enjoin the levy for that year as against it of the taxation thereby provided for, and in its petition averred that long before the enactment of this legislation it had accepted the provisions of the Hewitt act within
93 the time named therein; that it had up to that date paid the taxes provided for by the terms of the Hewitt act as accepted by complainant, and in due form sought the judgment of the State court upon its claim that the Hewitt act and its acceptances thereof constituted an irrevocable contract between the complainant and the State of Kentucky, which the legislation of 1892 would impair. The court in which the action was brought, in 1894, distinctly adjudged that this contention was well founded, and that the provisions of the Hewitt act and their acceptance by the complainant did constitute as irrevocable contract between the State and this bank, and, further, that the legislation of 1892 was void, as to the complainant, as impairing that contract. This decision of the court of appeals of Ken-

tucky affirming that judgment, being in favor of the right claimed under the Constitution of the United States, could not be appealed to the Supreme Court of the United States.

The bill of complaint, as amended, in the case before us insists, not only that the question of taxation between the complainant and the State of Kentucky, including the municipality of Covington up to 1904, is conclusively settled and adjudged by the court of appeals upon the basis referred to, but that the act of March 21, 1900, is also unconstitutional, first, in its attempt, by section 3, to authorize the levy of taxation upon the complainant for the years previous to March 21, 1900, and also, second, because the taxation provided for by the said act discriminates against national banks and levies upon the shares of national banks a greater rate of taxation than is
94 levied upon other moneyed capital, and particularly upon capital invested in State banks, and denies them the equal protection of the law.

As clearly established by many decisions, and particularly by that announced in the case of Owensboro National Bank *vs.* Owensboro, 173 U. S., 664, all State laws providing for the taxation of shares of national banks must be subject to the provisions of section 5219 of the Revised Statutes of the United States, which is in this language:

"SECTION 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The Supreme Court, in the case last referred to, held that section 4077 of the Kentucky statutes, so far as it effects national banks, is void, because it is in conflict with that section.

The Hewitt law having been repealed in 1892 and section 4077 of the Kentucky statutes being void as to national banks, there was no State statute in force for taxing the shares of the latter for municipal purposes until the act of March 21, 1900, was passed. The third section of that act is now assailed upon the ground that it undertakes to tax those shares retroactively and illegally.

The court will not attempt to decide that there may not, in
95 extreme cases, be a legitimate statutory enactment imposing a retroactive taxation for previous years upon a class of property not then subject to taxation at all; but it would at least be a rare case, and one which would come extremely near to taking

property for public use without just compensation, and might be most dangerous and oppressive, as well as destructive of many other established principles of the law of taxation. If the power to do this exist at all, there is no limit to it, and it might illustrate the subject to consider the result if church property, now exempt, should, as it lawfully might, be made subject to taxation in the future, and not only so, but retroactively for ten, or twenty, or even fifty years back. Here would be a practical confiscation of such property for public use, nor does the court mean to deny that where the law, in fact, imposes taxation upon property, which, however, is overlooked by the assessor or otherwise omitted from the assessment or some other step is taken which is faulty, the defects may not be cured by legislation. That curative legislation is admissible in such cases is a well-established doctrine of the courts, but there was no legislation—valid legislation—for taxing national bank shares as such before March 21, 1900, and the act of that date was not passed to validate defective steps taken to levy a lawful tax, but it is legislation which imposes an altogether new tax upon a new subject. Any attempt to give it the appearance of being a curative statute is merely nominal and colorable and cannot be effective. The previous legislation had been void because it was opposed to section 5219, Revised Statutes, and could not be cured, though other new and different legislation might be enacted. Moreover, it imposes a tax upon national bank shares alone, and the retroactive feature
96 *feature* of section 3 is a manifest discrimination against national bank shares, as there is no corresponding provision in any law of the State for the retroactive taxation of moneyed capital in the hands of State banks or of individuals. Other banks paid and now pay only a franchise tax for municipal purposes. National banks must, according to the act, pay, not a tax equivalent to the franchise tax imposed upon State banks, but a tax the rate of which is the same as that upon "real estate," which rate might not comply with section 5219 of the Revised Statutes unless it is the same as that put upon other "moneyed capital," as that phrase has been construed by the Supreme Court. It is manifestly very improbable that the rate of taxation on real estate can be equivalent to the rate imposed by the franchise tax. At all events, for the reasons indicated, it seems to the court to be very clear that section 3 of the act conflicts with the requirements of section 5219, because there is nowhere any corresponding retroactive imposition on State bank shares, and the rate of taxation on real estate can hardly be the equivalent of the rate of taxation imposed on State banks by the franchise tax, and, besides, as the bill shows, the State has collected and received from the complainant in this case the high taxes imposed under the Hewitt law up to the current year. There is no way to sue the State of Kentucky in her courts to compel it to refund the tax thus paid; nor is there any way to compel the State to make an adjustment of such payments in the collection of the taxes under section 3 of the act of 1900, although it is therein vaguely provided that credit shall be given; but

our laws afford no way authoritatively to make the provision
97 effective. No officer is charged with the duty or given the power to make it so. Until the State in this case has refunded the taxes wrongfully collected (if it should so turn out) under the Hewitt act, or shall provide some adequate way for doing so, it must be content with the taxation levied in the way provided by its own legislation, at least so long as it retains the money; otherwise there would be a double taxation. Certainly the State must not, in attempts to correct its legislation upon the subject of taxation, discriminate against national bank shares in such a way as to violate section 5219. So long as the State retains the taxes collected under the Hewitt law from this national bank, it is a manifest discrimination against it to again retroactively tax its shares for the same years without taxing also in the same way the State banks. We may sum up this phase of the case by saying that it may, in the abstract, be legally possible to pass a valid retroactive tax law, yet in the concrete case before us it was not done, the attempted legislation, for the reasons indicated, being in conflict with section 5219.

As the present holders of the complainant's shares may be very different persons from those who held them in previous years, as the present holders may have purchased under the previously existing law, and as their rights and interests would be injuriously affected by large payments for retroactive taxation, at least one phase of what has been said is well supported by the reasoning of the opinion of the court of appeals in Bellevue *vs.* Peacock, 89 Ky., 495. When the town of Bellevue made a contract with certain persons to improve a street it was supposed by all parties that the law empowered the town to impose the cost upon the abutting prop-
98 erty, and the contract so required. The court of appeals, however, decided that the town had no such power. Subsequently the legislature passed an act attempting to validate the contract and to impose the necessary taxation retrospectively upon the property. In a suit to test that question the court, in the opinion referred to, held the act unconstitutional, largely upon the ground that as there was no law to so burden the property at the time the improvements were made, the legislature could not subsequently impose it. The complainant and its shareholders in the case before us stand in substantially the same position as did the owners of the abutting property in the Bellevue case, in respect to previous judicial decisions and otherwise. There was no law until the act of 1900 imposing any such liability as it attempted to create, and at least, unless a similar burden is imposed upon other moneyed capital, the retroactive liability cannot be imposed upon national banks.

Coming now to the question of whether the whole act of March, 1900, is void as being in conflict with section 5219 of the Revised Statutes, it must be borne in mind that this may be manifested in either of two forms: First, it may appear on the face of the State law itself, as in the statute of 1892, pronounced invalid by the Supreme Court in the case of Owensboro National Bank *vs.* Owensboro, 173 U. S., or, second, it may come in the manner of enforcing the State law or in the manner of operating under it, as in cases like People *vs.*

Weaver, 100 U. S., 539, and Whitbeck *vs.* Mercantile National Bank, 127 U. S., 193.

99 It goes without saying that money invested in national bank shares should bear its ratable proportion of the public burdens. Nothing in the legislation of Congress nor in the decisions of the courts of the United States in the slightest degree prevents this. All that is done is, under section 5219, to guard money so invested against any form of State taxation which puts it at a disadvantage as compared with money invested in State banks. The wisdom and necessity of this rule is obvious. The professed object of the act of 1900 is to make the taxation upon all banks equal. The operations of the act may possibly in the future bring about such a result, though upon the face of the statute it appears well nigh impossible. *Prima facie* discrimination exists, the one being taxed on an entirely different basis or plan from the other. The State banks pay taxes upon a valuation of their franchise, &c., and national banks upon the valuation of their shares in the hands of individual holders. By no intelligent system of valuation does it appear possible to value a franchise annually as high as all the property of the corporation, as appears to be necessary in order to make the two modes of taxation agree. These cannot be equivalent in law, and *prima facie* they appear not to be equivalent in fact, though possibly this latter appearance may be overcome by proof. The City of Covington would therefore appear to be entitled to have an opportunity, if so desiring, to plead and prove that the result of the operations of the act of 1900 will not in fact discriminate in the next fiscal year against money invested in national bank shares, and after this opportunity is afforded the court can determine upon the evidence whether the actual results under the act conflict with section 5219 by imposing a greater rate of taxation upon money

100 invested in national bank shares than upon that invested in State bank shares, should there be any moneyed capital in said city so invested as to bring it within the rules adopted by the Supreme Court in construing section 5219.

In this particular case, however, the views so far expressed may all become subordinate to the question most energetically urged, that, as to the complainant, the act of 1900 can have no operation before 1904, because up to that time it has an irrevocable contract with the State to the effect that its shares shall only be taxed according to the provisions of the Hewitt law, and that this matter has been finally adjudicated by the courts of the State in the manner stated in the bill.

The general doctrine as to the conclusive effect of judgments upon matters in controversy between the same parties or those in privity with them is certainly broad enough, as usually stated, to cover cases like this if there are no exceptions to it. The case of New Orleans *vs.* Citizens' Bank, 167 U. S., 371, goes far towards closing the question, and will do so unless its operation should be limited by considerations now to be stated. Of course, as to the claim for taxes for the year named in the suit described in the bill of complaint, the judgment is absolutely conclusive, although in the light of later decisions

palpably erroneous. Should its effect be limited to the taxes for the year named in that suit, under the circumstances about to be stated, is an extremely interesting question. The judgment relied upon in the bill was certainly based upon the opinion that the Hewitt law and the complainant's acceptance of its provisions constituted an
101 irrevocable agreement between the bank and the State of Kentucky that the former should not be taxed otherwise than pursuant to the Hewitt law for any purpose, but in terms it only embraced the taxes for the year 1893 and only enjoined their collection. It did not in its language or scope embrace any others. It, however, as stated, went upon the general doctrine that there was a contract thus created between those parties which the Federal Constitution protected from any impairment. Bank Tax cases, 97 Ky., 591. Within a year or so after this judgment was rendered, and from which no appeal could be taken to the Supreme Court of the United States for the reason already indicated, the court of appeals overruled the doctrine which it had therein announced, and expressly held that there was no contract growing out of the facts adjudicated in the previous litigation. 39 S. W. Rep., 1030. It was then also held that legislation as to the manner of imposing taxation could not be made the basis of a contract, but was a matter entirely under the control of the State and might be altered at its pleasure. In the case of the Citizens' Savings Bank, &c., *vs.* Owensboro, 173 U. S., 636, the Supreme Court sustained in the fullest manner the last view taken of the question by the court of appeals of Kentucky, so that we have here a claim to the benefit of the doctrine of *res adjudicata* as against the clearest decision that the judgment relied on was based upon a proposition, not of fact, but of constitutional law, which has been utterly repudiated, not only by the highest judicial tribunal in Kentucky which announced it, but also by the Supreme Court of the United States itself. I have not found any decision upon the exact point, but I am greatly
102 oppressed by the thought that common justice may demand such a relaxation of the general rule as to matters adjudicated as to limit its operation within very wide bounds, it is true, but still to such as will exclude a case precisely like this, so far at least as it affects taxation subsequent to the announcement of the final settlement of the constitutional doctrine; otherwise much injustice and inequality cannot be avoided. It is impossible that it was with a purpose and desire to consider this phase of the question when it should come up that the Supreme Court, in the Owensboro case, 173 U. S., at page 648, so explicitly withheld an expression of its opinion as to whether the principle of *res adjudicata* would apply to suits for taxes claimed for future years in a case where there had been such a judgment as is here pleaded.

It may be that the authorities, which are very strong, will not permit even such an exception to be grafted upon the general rule, and it may also be that I shall ultimately conclude that in any event it will be becoming, in view of the opinion in the case of New Orleans *vs.* Citizens' Bank, 167 U. S., for this court to leave it to a higher tribunal to say whether there should be any limitations upon

the general rule as to the conclusive effect of judgments as between the parties to the litigation; but, as the decision of the motion for a temporary injunction does not absolutely require a final expression on the question, I shall leave it open for further consideration.

It has been suggested that, before any injunction is granted, the complainant in such a case should pay the amount of
103 taxes which is fairly due from it. This is a principle certainly in force where a valid law leaves no doubt that something is due, but if the claim of *res adjudicata* made by the complainant is maintained, such payment in this case has already been made, and even if the principle could apply here at all, where the entire tax is contested, it can hardly be enforced until a final judgment has determined whether there is anything at all due from the complainant, and, besides, there appears to be manifest equity in the bill, so far as it seeks to enjoin the enforcement of section 3 of the act.

It is also insisted that for the case made by the bill there is an adequate remedy at law. The case of The Bank of Kentucky *vs.* Stone, 88 Fed. Rep., 383, is a sufficient authority to the contrary, although that case was affirmed by a divided court (174 U. S., 799), and, besides, the relief sought as to section 3 of the act appears to be decisive of this question. It also seems to be settled, upon the authority of Hills *vs.* Exchange Bank, 105 U. S., 319, and the cases there cited, that the bank itself may sue in cases like this to protect the interest of its shareholders.

It follows that the complainant is entitled to an injunction *pendente lite* restraining the defendants and each of them, until the further order of the court, from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and also until the further order of the court restraining the defendants and each of them from collecting, either from the complainant or from any
of the holders of shares of its capital stock, any taxes
104 upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a rate higher than is permitted by section 5219, Revised Statutes, and, if so, to what extent.

Counsel will prepare the proper orders.

WALTER EVANS, *Judge.*

August 14, 1900.

And on the same day, to wit, on August 14, A. D. 1900, the following temporary injunction issued herein in words and figures following, to wit:

United States Circuit Court, District of Kentucky, at Covington, May Term.

TUESDAY, *August 14th, A. D.* 1900.

Court met.

Present: Hon. Walter Evans, judge.

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON ET AL.

This day came complainant, by J. W. Bryan, its counsel, and, with leave of the court, filed its amended bill of complaint
105 herein, with an exhibit therewith attached, and moved the court for a temporary injunction restraining the defendants from assessing or collecting any taxes for municipal purposes from complainant or any of its shareholders until the further order of the court. Pending said motion the defendants came by F. J. Hanlon, W. J. Julian, and Harvey Myers, their counsel, and, with leave of the court, tendered and filed a plea to the jurisdiction of the court of this action, and, with like leave of the court, were also permitted now to file a demurrer to the bill of complaint as amended, but neither said plea nor said demurrer was set down for argument, and the said motion of the complainant for the temporary injunction aforesaid, coming on to be heard, was argued by counsel, and the court, being sufficiently advised, delivered an opinion in writing, which is ordered to be filed, and pursuant thereto it is ordered, adjudged, and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed
106 are at a higher rate than is permitted by law and to what extent. Service of this order shall be made upon the defendants by delivery to each of them of a copy thereof.

UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

I, Jos. C. Finnell, clerk of the United States circuit court for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an entry made in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand, as clerk, and the seal of said court, at Covington, this 14th day of August, A. D. 1900, and of our Independence the 125th year.

JOS. C. FINNELL, *Clerk.*

And afterwards, to wit, on August 17th, A. D. 1900, the above temporary injunction was returned and filed, bearing the following endorsement, by the marshal, to wit:

"I hereby certify that I received the within writ on the 15th day of August, 1900, and that I personally served the same this 15th day of August, 1900, upon the said defendant, The City of Covington, by delivering to W. A. Johnson, its mayor, a true copy of this writ, and John N. Middendorf, assessor for the city of Covington, by delivering to him a true copy of the within writ. This, therefore, returned executed, as the law directs, this 15th day of August, 1900.

A. D. JAMES, *U. S. M.*,
By J. D. COMPTON, *Deputy.*

Fee, $4.00."

107 And on a day following, to wit, on December 17th, A. D. 1900, came the complainant, by its counsel, and filed motion to make permanent the *pendente lite* injunction. Said motion was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON, KENTUCKY, ET AL.

The complainant, The First National Bank of Covington, Ky., by J. W. Bryan, its counsel, moves that the injunction granted *pendente lite* herein be made permanent.

FIRST NATIONAL BANK OF COVINGTON, KY.,
By J. W. BRYAN, *Its Counsel.*

And on the same day, to wit, on December 17th, A. D. 1900, the following stipulation was filed herein, viz:

United States Circuit Court, District of Kentucky, at Covington.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL. } Stipulation.

It is hereby stipulated and agreed by and between the parties to this cause that they do now waive alike the setting down for argument of the defendants' plea to the jurisdiction of the court
108 and of their demurrer to the bill of complaint. It is also stipulated and agreed that if the court shall not sustain the

said plea, and if it shall disallow and overrule the said demurrer, then, that in that event, the bill shall be taken for confessed, the defendants now saying that they do not desire to answer the said bill or further plead thereto, and that, without waiting the thirty days required by the rules after a judgment *pro confesso*, the cause may be submitted for final judgment and the matter thereof and all pending motions be adjudged by the court.

THE FIRST NATIONAL BANK
OF COVINGTON, KY,
By J. W. BRYAN, *Its Counsel*,
F. J. HANLON,
Solicitor for Defendant City of Covington,
HARVEY MYERS,
Counsel for Def't.

And on the same day, to wit, on December 17th, A. D. 1900, an entry was made on the journal of said court clothed in words and figures following, to wit:

Journal "I," page 45.

The parties came, by their counsel, and the complainant, in writing now filed, moved the court "that the injunction granted *pendente lite* herein be made permanent," and thereupon the parties filed a stipulation in writing, and pursuant thereto this cause is now submitted for the judgment of the court upon said motion, and also upon the plea of the defendants to the jurisdiction of the court, and also upon their demurrer to the bill of complaint, and if the said plea and said demurrer are both disallowed and overruled, then the cause is submitted for the judgment of the court as upon a
109 final hearing, the bill, by said agreement, being then to be taken for confessed and further delay thereon being waived by the consent of the parties.

And on the same day, to wit, on December 17th, A. D. 1900, an entry was made upon the journal of said court clothed in words and figures following, to wit:

Journal "I," page 45.

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged, and decreed as follows, namely:

First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

Second. That the bill of complaint, as amended and to which the demurrer and plea were considered as applying, is sufficient and contains matters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appear-

ing to the court, it is further ordered, adjudged, and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants,
110 until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendant elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant.

Fifth. It is further ordered, adjudged, and decreed that the complainant recover of the defendants its costs herein expended, to be taxed by the clerk.

The complainant and the defendants alike, separately and each for himself, excepts to the foregoing judgment.

Afterwards, to wit, on December 19th, A. D. 1900, the following restraining order issued herein in words and figures as follows, to wit:

111 United States Circuit Court, District of Kentucky, at Covington, December Term.

MONDAY, *December 17th, A. D.* 1900.

Court met.

Present: Hon. Walter Evans, judge.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

This cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged, and decreed as follows, namely:

First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

Second. That the bill of complaint is sufficient and contains mat-

ters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged, and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from
112 any of the holders of the shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendants elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant.

Fifth. It is further ordered, adjudged, and decreed that the complainant recover of the defendants its costs herein expended, to be taxed by the clerk.

The complainant and the defendants alike, separately and each for himself, excepts to the foregoing judgment.

UNITED STATES OF AMERICA, }
District of Kentucky, } ss:

I, Jos. C. Finnell, clerk of the United States circuit court for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an order made and entered in the matter set out in the caption
113 hereto, as the same appears from the records and files of this office.

Witness my hand, as clerk, and the seal of said court, at Covington, this 19th day of December, A. D. 1900.

JOS. C. FINNELL, *Clerk.*

And on the day following, to wit, on December 20th, A. D. 1900, the restraining order was returned and filed, bearing the following endorsement by the marshal, to wit:

"I hereby certify that I received this writ on the 20th day of December, 1900, and that I personally executed it by delivering a true copy of the within order to W. A. Johnson, mayor of the city of Covington, defendant; also to W. A. Johnson, individual-, on the 20th day of December, 1900, in Covington, Ky.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *Deputy.*

Fee, $4.00."

And afterwards, to wit, on January 7th, A. D. 1901, an entry was made upon the journal of said court clothed in words and figures following, to wit :

Journal "I," page 61.

The defendants, The City of Covington and John N. Middendorf, the assessor of the city of Covington, considering themselves
114 aggrieved by the judgment herein on the 17th day of December, 1900, come now and present to the court their petition for an appeal to the Supreme Court of the United States, together with an assignment of errors, asserted and intended to be urged in that behalf.

On consideration whereof the court now orders that on a bond, as provided by law, being filed, in the penal sum of $500.00, to the acceptance of the clerk, the said appeal be allowed, and it is ordered that a transcript of the record, proceedings, and papers upon which the judgment of this court was rendered in this cause, duly authenticated, be sent to the Supreme Court of the United States, according to law in such case provided.

Said petition for appeal referred to in the foregoing entry was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky, at Covington, December Term.

MONDAY, *December 17th*, 1900.

FIRST NATIONAL BANK
vs.
THE CITY OF COVINGTON ET AL.

Before the Honorable Walter Evans, judge.

To the Honorable Walter Evans:

The above-named defendant-, City of Covington and John N. Middendorf, the assessor of the city of Covington, conceiving themselves aggrieved by the order and decree made and entered
115 in the above-entitled cause on December 17th, 1900, wherein and whereby it was ordered, adjudged, and decreed "that the said defendants and each of them be enjoined and restrained from assessing for taxation any of the shares of stock in the complainant bank, either against complainant or any holder of its shares,

or making any levy of taxes upon any of said shares for any purpose for any time or period previous to March 21, 1900, and from collecting from complainant or any of its shareholders any taxes upon any of said shares of stock for any time subsequent to that date," said decree being final; to which decree the said defendants and complainant and each of them excepted at the time of the rendition thereof. The said defendant-, City of Covington, by their attorney, now come and do hereby appeal from said order and decree of December 17, 1900, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herein, and they and each of said defendants pray that this appeal may be allowed, and they pray for an order fixing the amounts of the supercedeas bond which defendant- shall give and furnish upon said appeal, and that a transcript of the record, papers, and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States, to the end that said decree may be reversed and that said errors may be corrected; and so they will ever pray.

F. J. HANLON,
City Solicitor, for City of Covington.

HARVEY MYERS,
W. H. JULIAN,
Of Counsel.

116 And on the same day, to wit, on January 7th, A. D. 1901, said assignment of errors referred to in the foregoing petition for appeal was filed herein. Said assignment of errors was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky, at Covington, December Term.

MONDAY, *December 17th*, 1900.

FIRST NATIONAL BANK
vs.
THE CITY OF COVINGTON ET AL. } Assignment of Errors.

Before the Hon. Walter Evans, judge.

To the honorable Judge Evans:

Comes now the defendants and each of them and file the following assignment of errors, upon which they and each of them will rely:

First. The court erred in overruling the defendants' plea to the jurisdiction of the court.

Second. The court erred in holding the bill of complaint as amended, to which the plea and demurrer were considered as applying, sufficient, and in overruling the demurrer of the defendants thereto.

Third. The court erred in enjoining the defendants and each of them from assessing the shares of stock in complainant bank, and

from levying taxes thereon for any purpose for any time or period previous to March 21, 1900, and erred in enjoining and restraining the collection of any taxes, either from the complainant bank or from any of the holders of the shares of the capital stock of
117 said bank, for any time subsequent to that date.

Fourth. The court erred in retaining control of this cause for any purpose.

Fifth. The court erred in decreeing costs herein against defendant.

Sixth. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint.

In order that the foregoing assignment of errors may be and appear of record, the respondents and each of them present the same to the court and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

F. J. HANLON,
City Solicitor, for the City of Covington.

HARVEY MYERS,
W. H. JULIAN,
Of Counsel.

And on a day following, to wit, on January 18, A. D. 1901, a bond was filed in the clerk's office of said court, which was and is in words and figures following, to wit:

Circuit Court of the United States, District of Kentucky.

118 THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON and JOHN N. MIDDENDORF, Assessor of the City of Covington.

Know all men by these presents that we, The City of Covington and The American Bonding and Trust Company of Baltimore City, are held and firmly bound unto The First National Bank of the City of Covington in the sum of five hundred dollars, to be paid to the said The First National Bank of the City of Covington, Kentucky, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of January, A. D. 1901.

Whereas the above-named The City of Covington, Ky., and John N. Middendorf, assessor of said city of Covington, Ky., have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the District of Kentucky, at Covington:

Now, therefore, the condition of this obligation is such that if the above-named The City of Covington, Ky., and John N. Middendorf, assessor of the said city of Covington, Ky., shall prosecute this said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

119 THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY,
By BEN. A. ADAMS, *Vice-Pres't.*

[SEAL.]

Attest: L. J. DROEGE, *Ass't Sec'y.*

THE CITY OF COVINGTON,
By W. A. JOHNSON, *Mayor.*

Sealed and delivered in the presence of—
JOS. C. FINNELL, *Clerk.*

Approved January 18, A. D. 1901.

JOS. C. FINNELL,
Clerk U. S. Circuit Court, Ky. Dist.

UNITED STATES OF AMERICA, *District of Kentucky,* } ss:

I, Jos. C. Finnell, clerk of the circuit court of the United States for the sixth judicial circuit and district of Kentucky (at Covington), do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the cause set out in the caption hereto, as the same appears of record and on file in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Covington, Kentucky, this 15th day of February, A. D. 1901.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL,
Clerk U. S. Cir. Court, Ky. Dist., at Covington.

Endorsed on cover: File No., 18,056. Kentucky C. C. U. S. Term No., 255. The City of Covington, Kentucky, and John N. Middendorf, assessor of the city of Covington, appellants, *vs.* The First National Bank of Covington, Kentucky. Filed February 20, 1901.